

South African CRIME QUARTERLY

No. 65 | September 2018



- > Strikers describe Marikana Scene 2
- > The TCB and evidence obtained through human rights violations
- > The role of bank associated robbery in South Africa – an assessment
- > Courts' inconsistent approach to sexual grooming when sentencing
- > Book review: Anneliese Burgess
- > On the record with Nicolette Naylor and Sibongile Ndashe

The Institute for Security Studies (ISS) partners to build knowledge and skills that secure Africa's future. The ISS is an African non-profit with offices in South Africa, Kenya, Ethiopia and Senegal. Using its networks and influence, the ISS provides timely and credible policy research, practical training and technical assistance to governments and civil society.

The Centre for Law and Society (CLS) is an innovative multi-disciplinary centre in the Faculty of Law where scholars, students and activists engage critically with, and work together on, the challenges facing contemporary South Africa at the intersection of law and society. Through engaged research, critical teaching and robust exchange, CLS aims to shape a new generation of scholars, practitioners and activists, and to build the field of relevant legal theory, scholarship and practice, that is responsive to our context in South Africa and Africa.

© 2018, Institute for Security Studies and University of Cape Town



All material in this edition of SACQ, with the exception of the front cover image, is subject to a *Creative Commons Attribution-ShareAlike 4.0 International License*. Licensing conditions are available from <https://creativecommons.org/licenses/>

ISSN 1991-3877

First published by:

The Institute for Security Studies,
PO Box 1787, Brooklyn Square 0075
Pretoria, South Africa

Centre for Law and Society
University of Cape Town, Private Bag X3,
Rondebosch, 7701 Cape Town, South Africa

www.issafrica.org

www.cls.uct.ac.za

SACQ can be freely accessed on-line at

<http://www.issafrica.org/publications/south-african-crime-quarterly>

Editor

Kelley Moulton e-mail kelley.moulton@uct.ac.za

Editorial board

Judge Jody Kollapen, High Court of South Africa

Professor Ann Skelton, Director: Centre for Child Law, University of Pretoria

Professor Eirena van der Spuy, Institute for Safety Governance and Criminology, Department of Public Law, University of Cape Town

Professor Bill Dixon, Professor of Criminology, School of Sociology and Social Policy, University of Nottingham, UK

Professor Rudolph Zinn, Department of Police Practice, University of South Africa

Professor Jonny Steinberg, Professor of African Studies, African Studies Centre, University of Oxford

Professor Jamil Mujuzi, Faculty of Law, University of the Western Cape

Professor Catherine Ward, Department of Psychology, University of Cape Town

Professor Dee Smythe, Department of Public Law, University of Cape Town

Associate Professor Lukas Muntingh, Project Head, Civil Society Prison Reform Initiative, Dullah Omar Institute, University of the Western Cape

Dr Hema Hargovan, School of Built Environment and Development Studies, University of KwaZulu-Natal

Dr Chandré Gould, Senior Research Fellow, Crime and Justice Programme, Institute for Security Studies

Ms Nwabisa Jama-Shai, Senior Researcher, Gender and Health Research Unit, Medical Research Council

Ms Nomfundo Mogapi, Executive Director: Centre for the Study of Violence and Reconciliation, Centre for the Study of Violence and Reconciliation

Cover Zute Lightfoot / Alamy Stock Photo

Production Image Dezign www.imagedezign.co.za

Printing Remata

Contents

SA Crime Quarterly

No. 65 | September 2018

Editorial

Hard questions, big challenges 3

Kelley Moulton and Diane Jefthas

Research articles

Shot while surrendering 7

Strikers describe Marikana Scene 2

David Bruce

A missing link in the Traditional Courts Bill 2017 23

Evidence obtained through human rights violations

Robert Doya Nanima

Is crime getting increasingly violent? 33

An assessment of the role of bank associated robbery in South Africa

Mahlongonolo Thobane and Johan Prinsloo

In no certain terms 43

The court's inconsistent approach to the role of sexual grooming when sentencing in cases of sexual abuse of children under 16

Nicole van Zyl

Book review

Anneliese Burgess 55

Eirena van der Spuy

On the record

Nicolette Naylor and Sibongile Ndashe 59

Editorial policy

South African Crime Quarterly (SACQ) is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus of the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including academics. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.

Policy on the use of racial classifications in articles published in *South African Crime Quarterly*

Racial classifications have continued to be widely used in South Africa post-apartheid. Justifications for the use of racial descriptors usually relate to the need to ensure and monitor societal transformation. However, in the research and policy community racial descriptors are often used because they are believed to enable readers and peers to understand the phenomenon they are considering. We seem unable to make sense of our society, and discussions about our society, without reference to race.

South African Crime Quarterly seeks to challenge the use of race to make meaning, because this reinforces a racialised understanding of our society. We also seek to resist the lazy use of racial categories and descriptors that lock us into categories of identity that we have rejected and yet continue to use without critical engagement post-apartheid.

Through adopting this policy SACQ seeks to signal its commitment to challenging the racialisation of our society, and racism in all its forms.

We are aware that in some instances using racial categories is necessary, appropriate and relevant; for example, in an article that assesses and addresses racial transformation policies, such as affirmative action. In this case, the subject of the article is directly related to race. However, when race or racial inequality or injustice is not the subject of the article, SACQ will not allow the use of racial categories. We are aware that some readers might find this confusing at first and may request information about the race of research subjects or participants. However, we deliberately seek to foster such a response in order to disrupt racialised thinking and meaning-making.

Editorial

Hard questions, big challenges

Kelley Moulton and Diane Jeffthas

kelley.moulton@uct.ac.za

diane.jeffthas@uct.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a5612>

Hard questions, big challenges – the articles in this edition of the *South African Crime Quarterly* (SACQ) are a vivid illustration of the ways that South Africa's enduring problems remain perennially, persistently present. Andrew Faull pointed out in his editorial of a year ago (SACQ, September 2017) that South Africa's democratic gains were under threat from a number of quarters: commercial crime, state capture, collusion and abuse. A year on, some of these issues may feel a little like old news, as the reporting cycle (or possibly more accurately, our attention) has moved on from the #Guptaleaks to questions of land, expropriations, elections and, perhaps most uncomfortably, sexual harassment.

Certainly, these problems are not new. The period since our last edition marked the sixth anniversary of the Marikana massacre, which took place on 16 August 2012, where 34 platinum miners who were on strike for better wages and improved living conditions were shot and killed by South African Police Service (SAPS) members. Six years on from the tragic events of that Thursday and there are still critical questions about who gave the order to shoot to kill at Marikana and consequently, who from the SAPS will be held accountable for what transpired. A commission of inquiry into the massacre, chaired by Judge Ian Farlam, released its report in June 2015, finding that there should be additional investigation (and possible prosecution) by the National Prosecuting Authority (NPA) into those responsible for the killings – both police and strikers.

Sexual harassment in the workplace has been highlighted by feminist scholars, including criminologists, for at least four decades. It is also not a uniquely South African affliction, as the global #MeToo movement attests. However, despite a progressive enabling legislative framework and significant policy attention early in our democracy, sexual harassment (and sexual offences more broadly) remains one of the country's pervasive, and silent, silencing scourges. Recent events have brought public scrutiny of the ways in which South African society tolerates this patriarchal exercise of power over women. We have watched as vaunted businesses, trusted civil society organisations and their leaders – those customarily lauded for speaking truth to power – have been accused and vilified as perpetrators, enablers and silencers. Cleavages have opened up as the backlash against the outing of these behaviours has taken hold: shifting blame onto the survivor, decontextualising their experiences, creating false equivalences between the systematic harassment of women and instances of women who sexually harass men, and holding up flawed disciplinary processes as impartial and fair.¹ Conversations are happening around the country on what the appropriate response is.

Perhaps in a year we will reflect on these as moments passed; as little more than poignant anniversaries. Hopefully not. Rather, we should use these opportunities to challenge our democracy to live up to its promise – by owning up to the vulnerability of victims in our country, to the insecurity of our children, to the tenuous safety of communities, to the enormously compromised position of many of our workers. The articles in this edition of SACQ focus the research spotlight on a number of these issues, filling gaps in our empirical understanding of these ‘sticky problems’: the events at Marikana Scene 2, bank associated robbery, sentencing in sexual grooming cases where complainants are under the age of 16, and the use of illegally-obtained evidence under the proposed Traditional Courts Bill. These articles build on conversations in the field – including on the pages of SACQ – about gaps in policy and legislation, implementation, research and knowledge.

This issue

David Bruce presents an analysis of statements from the injured and arrested strikers taken by the Independent Police Investigative Directorate in the five days immediately after the Scene 2 massacre at Marikana at which 17 of the fatal shootings took place. By examining data from the contents of these statements, as well as the circumstances in which they were taken, the article interrogates the assertion that ‘strikers were shot by police while surrendering or injured at Scene 2’.² Bruce argues that, taken as a whole, the statements are a reliable source that suggests that some of the strikers at Scene 2 where indeed shot while surrendering.

Robert Doya Nanima extends the conversation on the latest version of the proposed Traditional Courts Bill (TCB), analysing the admission of evidence obtained through human rights violations. Nanima reviews the current Bill, and reflects on the challenges that arise with regard to evidence obtained in this way, discussing the practical difficulties of applying section 35(5) of the Constitution of the Republic of South Africa under the TCB’s framework. Nanima finds that the Bill does not properly provide a satisfactory mechanism to evaluate evidence in criminal cases before it is admitted, and therefore does not safeguard against over-zealous ‘prosecution’ and ensure human rights protections for accused persons.

Mahlngonolo Thobane and Johan Prinsloo discuss ‘bank associated robberies’ – robberies (or attempted robberies) of cash that are committed against a bank client while *en route* to or from a bank or ATM. A relatively unknown phenomenon in public discourse on crime in South Africa, these robberies are of particular concern to the banking industry and criminal justice practitioners owing to their violent, traumatic nature and dramatic increase that put the general public at risk. Thobane and Prinsloo discuss the dynamics of bank associated robbery and its interrelationship with the so-called trio crimes of home invasions and robbery, business robberies and vehicle hijacking. They argue that these crimes increase perceptions about the violent nature of crime in South Africa and its increasing incidence, which place a huge burden on the criminal justice system.

Nicole van Zyl considers whether evidence of sexual grooming influences the decisions of South African courts when passing sentence on offenders who have been found guilty of sexual assault or rape of children. The article addresses three themes in the sentencing of these cases – the lack of violence, the apparent consent of a child under 12, and the appropriateness of correctional supervision as an alternative to custodial sentencing – and examines whether or how the characteristics of sexual grooming form part of these decisions. The article argues that evidence of

grooming should play a more important role in sentencing decisions, providing context on the nature and impact of the crime that the court is asked to consider.

Elrena van der Spuy reviews Anneliese Burgess's book, *Heist! South Africa's cash-in-transit epidemic uncovered*, published in 2018 by Penguin Random House. She concludes that the book is 'riveting and troubling reading' that brings a 'disciplined inquiry to a complex issue of organised criminality' through an examination of 10 case studies. Van der Spuy lauds Burgess's work for its robust data gathering, its detailed portrayal of the actors and groupings involved in heists, their modus operandi and their justifications for engaging in the so-called seductions of crime. Van der Spuy concludes that *Heist!* sheds light on the connections between the illicit and licit, and the interplay of structure and agency that enables this kind of criminality.

Finally, this edition's *On the Record* presents a conversation between Nicolette Naylor (Director, Ford Foundation for Southern Africa) and Sibongile Ndashe (Executive Director: The Initiative for Strategic Litigation in Africa) on the role of the law in responding to sexual harassment in the workplace.

Notes

- 1 M Judge, 'Watch where you put your hands, oaf!' *Mail & Guardian*, 31 August 2018, <https://mg.co.za/article/2018-08-31-00-watch-where-you-put-your-hands-oaf> (accessed 24 September 2018).
- 2 Marikana Commission of Inquiry, Written submissions of the South African Human Rights Commission regarding 'phase one', 29 October 2014, 474.

Shot while surrendering

Strikers describe Marikana Scene 2

David Bruce*

davidbjhb@gmail.com

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a3049>

This article is concerned with the events of 16 August 2012 at the Lonmin Marikana mine in the North West province, when members of the South African Police Service killed 34 people, most of whom were striking mineworkers. These killings, now widely referred to as the Marikana massacre, are regarded not only as a tragedy but also as an event of great significance in South Africa's contemporary history. A commission of inquiry was held into the killings, but it did not reach any conclusions about what had happened at the second massacre site, commonly referred to as Scene 2, at which 17 of the fatal shootings took place. While these events are now the subject of an investigation by police oversight and criminal justice agencies, we cannot assume that this will reveal the truth about the killings at Scene 2. To add to our understanding of the events at Marikana, this article analyses statements from the injured and arrested strikers taken by the Independent Police Investigative Directorate in the five days immediately after the massacre. This article examines data from the statements, and the circumstances in which these statements were taken, in order to interrogate the assertion that 'strikers were shot by police while surrendering or injured at Scene 2'.¹ It concludes that, taken as a whole, the statements are a reliable source of information that some of the strikers at Scene 2 were indeed shot while surrendering.

On 16 August 2012, 34 men, most of them mineworkers² who were on strike for higher wages at the Lonmin Marikana platinum mine in North West province, were killed by members of the South African Police Service (SAPS). This incident, which has come to be known as the Marikana massacre,³ followed a week of conflict at the Lonmin mine. At the time of the

massacre there had already been 10 deaths in strike-related conflict. Two SAPS members and three strikers were killed in a confrontation between police and strikers on Monday 13 August. In other incidents between Sunday 12 and Tuesday 14 August, two Lonmin security guards, one striker and two other mineworkers were also killed. Altogether seven of these people – including the two SAPS members and five others – are known to have been, or are likely to have been, killed by strikers.⁴

The massacre on 16 August took place during two distinct shooting episodes. One of these

* David Bruce is an independent researcher specialising in policing and criminal justice and a visiting research fellow at the School of Governance at the University of the Witwatersrand. The research on which this article is based was made possible by financial support from the Open Society Foundation and the Institute for Security Studies. Opinions and conclusions are those of the author.

occurred just before 4 pm (15h54). The other, at a location 500 m away from the first, started 15 minutes later, at about 16h09. In each of these episodes 17 people were killed – 34 people in total. These two episodes have come to be known as (crime) Scene 1 and Scene 2. This article focuses on aspects of the evidence regarding the killings at Scene 2, provided in statements taken by the Independent Police Investigative Directorate (IPID)⁵ from injured and arrested strikers in the days immediately after the massacre. Some of these statements contain allegations that some of the people shot at Scene 2 were shot while surrendering. This article assesses the reliability of these allegations.

The official response to the strike

The strike was an unprotected one that took place outside of the formal collective bargaining process. Although the strikers were acting as an autonomous group,⁶ the strike occurred amid conflict between the National Union of Mineworkers (NUM), then the dominant labour union in mining and one of the biggest unions in South Africa, and an emergent union, the Association of Mineworkers and Construction Union (AMCU), over supremacy within the platinum industry. In the aftermath of the commodities boom, Lonmin itself was in financial trouble⁷ and therefore strongly resistant to the possibility of a pay increase, particularly one that was being demanded by an informally constituted group of workers.

A complex mix of factors combined in shaping the official response to the strike. On the one hand the violent nature of the strike itself, particularly the killing of the two police officers on the 13th, appears to have hardened attitudes towards the strikers. The position and influence of Cyril Ramaphosa, then a non-executive director of Lonmin and senior member of the ruling African National Congress's National Executive Committee, also contributed to the sense of urgency about responding to the

matter. The strike was seen as a threat to the interests of the NUM itself, at the time one of the largest members of the Congress of South African Trade Unions and therefore an integral and important member of the ruling political and labour 'tripartite'⁸ alliance. There was additional anxiety in official quarters that the strike might be exploited by a charismatic political leader, Julius Malema. Malema had previously been president of the ruling party's Youth League, but at the time of the strike had recently been expelled from the party and had started to position himself as an adversary of both the ruling party and its president, Jacob Zuma. Earlier in 2012 he had intervened during a strike at the Impala platinum mine and was regarded by some as having defused the situation.⁹ There was concern that he might also obtain credit for resolving the situation at Marikana. The combined consequence of these factors was not only that the strikers were regarded with a degree of antipathy but also that bringing an end to the strike, if necessary by force, was treated as an urgent matter.

Understanding the Marikana massacre

After the massacre, a commission of inquiry was appointed by Zuma. The report of the Marikana Commission of Inquiry was submitted to the president at the end of March 2015 and released to the public in June 2015. Notwithstanding the findings of the commission, the Marikana massacre and the series of confrontations that preceded it remain a source of controversy.

The killings by police that occurred on 16 August have been justified by some commentators with reference to the killings and other violence perpetrated by people who were involved with the strike over the preceding days. For instance, during a public address the day before he released the report of the Marikana Commission, Zuma had said that 'the Marikana

miners were shot after killing people'.¹⁰ The report of the Marikana Commission itself refers to the violence on the part of the strikers as a major contributing factor to the subsequent events.¹¹ The tendency to allocate responsibility for the massacre to the strikers is reinforced by the fact that, for many people, their understanding of what took place at Marikana has primarily been shaped by the television footage of the shooting at Scene 1. Viewers of this footage are likely to believe that it shows police shooting strikers who are attacking them. It is not widely known, for instance, that the strikers ran towards the line of armed SAPS members only after teargas, stun grenades and rubber bullets had been fired behind, and into the side of, the group of strikers.¹² This is likely to have propelled them towards police lines.

On the other hand, many people have expressed anger about the massacre, calling for those responsible to be held accountable.¹³ Considerable attention has been drawn to the political influences, including the likely role of political leaders, on the decision that police should disarm the strikers.¹⁴ The massacre has also been characterised as a product of reckless decisions made by the senior leadership of the SAPS, a breakdown in the senior command structure of the police at Marikana,¹⁵ and 'toxic collusion' between the SAPS and Lonmin.¹⁶ Others see the massacre as a product of deficiencies of public order policing, or other aspects of the policing system in South Africa.¹⁷ At the broadest level, the massacre has been depicted not simply as the result of human agency but as a result of 'the structural violence of apartheid ... [which] remains a feature of the migrant labour system on which the mining industry, including platinum producers like Lonmin, continues to depend'.¹⁸

Many of these perspectives are relevant to understanding the events at Marikana in August 2012. At the same time, key questions remain

unanswered, and there is no broadly accepted explanation for what happened at Scene 2. Acts of violence can never purely be understood in terms of structural factors, and the actions of subordinates can also not be understood simply in terms of the decisions of their leaders.¹⁹ This is especially pertinent to the killings at Scene 2. The evidence indicates that this part of the police operation was unplanned, with an absence of any significant command and control.²⁰

The shootings at Scene 1 and Scene 2

All of the people who were killed at Scene 1 were shot in a single 12-second-long volley of simultaneous gunfire by 49 or more SAPS members, including 47 members of the SAPS Tactical Response Team, one Public Order Policing unit member and at least one SAPS member whose identity is unknown.²¹ Almost all of the police shooters were standing in a single line facing the oncoming strikers.²² Although Scene 1 was the subject of extensive scrutiny at the Marikana Commission, it did not come to any conclusions about whether the strikers had been attacking the police when the police opened fire on them. The Commission did, however, conclude that SAPS members who fired their weapons at the strikers during Scene 1 'had reasonable grounds for believing they were under attack',²³ although some of them may have exceeded the bounds of reasonable private defence.²⁴ A number of news agencies' television crews captured footage of the incident, including from just behind the police line, which not only helped to clearly establish the basic facts of the shooting but also greatly improved the commission's ability to analyse the incident.

The second shooting episode is entirely different. At Scene 2, the strikers who were shot were not concentrated in a single group or procession, and the police shooters fired at the strikers from a number of different positions.²⁵ Although a similar number of rounds were used by police

at both incidents,²⁶ the shootings at Scene 2 extended over a period of 11 minutes compared to just over 12 seconds at Scene 1.²⁷ There is also only evidence about the location from which 29% of these rounds were fired.²⁸

The shootings at Scene 2 started close to 15 minutes after the shooting at Scene 1. Many of the strikers fled in a westerly direction after the first shooting. Some of their statements indicate that they tried to flee towards the informal settlements on the far west side, but went to hide instead in the Scene 2 area when they saw police approaching from that direction.²⁹ Two other groups of police were approaching at the same time from the east and south.³⁰ While this aspect of the police operation was unplanned it meant that strikers at Scene 2 were effectively surrounded, although the police who were involved themselves did not know this.

The Scene 2 area is roughly circular, with a diameter of about 200 m. A formation of large rocks lying north to south ('the high rocks') stands in a fairly central position and is identified by some people as a koppie (it was referred to as 'Koppie 3' or the 'small koppie' at the commission). Other parts are covered in grass. To the west of the southern end of the high rocks is an area that is strewn with large boulders. This part of the Scene 2 area was overgrown by thick bushes and small trees at the time of the massacre. It is referred to by some as the 'killing zone'.³¹

Analysis of the events of Scene 2 has identified a number of distinct groups of victims.³² The largest of these groups is comprised of 11 of the 17 deceased, all of whom were fatally injured in the 'killing zone' area.³³ As described in the report of the Marikana Commission, this group was 'killed in what can be described as a crevice in a rocky area ... where they appear to have sought refuge during the operation'.³⁴ Some of the photographs that were taken from police helicopters during the Scene 2 shootings

show striking workers huddled in this area, apparently trying to take cover from the water cannons and police gunfire.³⁵ The statements about strikers who were shot while surrendering appear to originate from strikers who were in or near to the killing zone.

The SAPS failure to account for the Scene 2 killings

The Marikana Commission made no findings about the reasonableness or legality of the police shootings at Scene 2. The commission did, however, remark that the SAPS 'provided no details of what happened with regard to the deaths of most of the deceased' and that where it had provided evidence this 'did not bear scrutiny when weighed up against the objective evidence'.³⁶ In effect, therefore, the commission found that the SAPS had not managed to provide a coherent account for any of the deaths at Scene 2.

The commission's inability to reach any conclusive findings about the circumstances of the killings at Scene 2 was owing not only to the lack of coherence of the SAPS account but also to the fact that SAPS members (at various levels) made a concerted effort to conceal the facts of what had occurred. This obfuscation started shortly after the shootings at Scene 2, when SAPS members planted weapons on the bodies of six of the deceased strikers.³⁷

The day after the massacre, SAPS National Commissioner Riah Phiyega issued a press statement that was a modified version of an account of the events that had been provided to her by police commanders. The initial written account that Phiyega had received made it clear that the killings by police had taken place in two separate incidents. However, the statement issued by the National Commissioner created the impression that the killings had taken place in one continuous flow of events and concealed the fact that there were two distinct shooting

locations.³⁸ After the initial confrontation (identifiable as Scene 1), the press statement describes the strikers storming towards the police while ‘firing shots and wielding dangerous weapons’.³⁹ The initial written account that Phiyega had received from the SAPS commanders did not describe the strikers attacking police in the second incident.⁴⁰

Over the following months, the SAPS generated a more detailed account of the events at Scene 2, which formed part of its opening presentation to the commission in early November 2012.⁴¹ The commission roundly rejected this version, because it was inconsistent with other objective evidence.⁴² Analysis of the statements provided by many of the SAPS members also casts doubt on whether these can be regarded as an accurate account of the events at Scene 2.⁴³

In light of the absence of clear evidence that the shootings at Scene 2 had been lawful, the commission referred the entire matter for an investigation, to be supervised by the North West Director of Public Prosecutions, to ascertain the criminal liability of all SAPS members who were involved in the shooting.⁴⁴ In August 2017, IPID reported that it had submitted all dockets pertaining to the massacre to the National Prosecution Authority. However, owing to budgetary constraints, IPID had not been able to carry out a reconstruction of the events of Scene 2, despite the fact that this had been recommended by the Marikana Commission.⁴⁵

The time of writing – August 2018 – marks six years since the massacre. Despite the Marikana massacre’s being designated as a watershed moment in South Africa’s post-apartheid history,⁴⁶ there is still no detailed information in the public domain about what happened at Scene 2. The official process for investigating the massacre has now moved from fact finding to criminal investigation and prosecution. No police have, however, been prosecuted for the killings at either Scene 1 or 2⁴⁷ and it remains

unclear whether there is adequate evidence to prosecute any of those involved. This may be related to the difficulty in securing the necessary evidence to ensure a successful prosecution.

Virtually all of those who were killed were shot with R5 rounds. These rounds splinter on impact, which means that it has thus far not been possible to link any of the deaths to specific firearms using forensic techniques. The ballistics evidence shows that most of the victims were fatally wounded by shots fired from some distance away, which means that few, if any, of the survivors are likely to be able to identify the police officers who shot strikers.⁴⁸ Up to this point, SAPS members have largely closed ranks to protect themselves and their colleagues against being incriminated for the killings. Even if prosecutions are instituted, they may not necessarily provide greater clarity about the killings.

Shot while surrendering?

The Marikana Commission had access to a variety of evidence about the events at Scene 2. This included ballistic and forensic evidence, photographs (taken intermittently from police helicopters), recordings from the police radio⁴⁹ and video evidence (although not of any of the actual shootings). Beyond this, the evidence files from the commission provide other sources of information, including statements by strikers and SAPS members.

A sentence in the final submission to the Marikana Commission by the lawyers for the South African Human Rights Commission (SAHRC) states that ‘[f]orty strikers who were injured and/or arrested on 16 August allege that strikers were shot by police while surrendering or injured at Scene 2’.⁵⁰ These allegations are contained in statements taken by IPID personnel from strikers who were injured and hospitalised, or who had been arrested and

were in the holding cells at a number of different police stations in the vicinity of Marikana.

During the research on which this article is based, 57 statements were identified that asserted that strikers had been 'shot while surrendering' (SWS) at Scene 2. This article aims to deepen the process of fact-finding initiated by the Marikana Commission by evaluating the credibility of this assertion. In doing so it also aims to contribute to research about violence and the use of force by police, and to support the victims' families (and the public) in their quest to get closer to the truth about the killings at Marikana.

The approach taken in this article is not to focus on the testimony of specific individuals but to examine collectively a group of narratives recorded in the five days immediately following the massacre. Analysis of this body of information as a whole was never presented to the commission, and it has not as yet been used to establish the facts about what happened at Scene 2.

Identifying statements from strikers who were at Scene 2

The line in the SAHRC final submission referring to the allegations that strikers were shot while surrendering is based on the summaries of statements of injured and arrested strikers that are contained in Annexure G to the SAHRC submission.⁵¹ In Annexure G, 138 of the 279 summarised statements are classified as statements that deal with the events at Scene 2. Copies of all of the statements, collated into a number of large PDF files, were provided to the researcher by the Marikana Commission evidence leaders. Analysis of the statements formed part of a larger project focused on understanding the events at Scene 2,⁵² and data analysis for this article started with the reading of these 138 statements. In addition, roughly 50 other statements were read. These

were selected on an ad hoc basis by referring to the summary provided in Annexure G.

One of the initial challenges was differentiating statements with information about Scene 2 from other statements. In statements that dealt with Scene 2 the arrested or injured strikers generally described themselves as fleeing after a first shooting incident (Scene 1) and going to hide at another place. It was self-evident that a statement could be classified as related to Scene 2 where it described a second shooting incident at a place where a number of people were also killed. Statements were also included if the person described themselves as hiding at a place with geographical or physical features consistent with Scene 2. For example, many of the statements described hiding among 'rocks' or 'stones', referred to the place as a 'koppie' or 'mountain', or identified it by the bushes or trees covering the area.⁵³

Altogether 153 statements were deemed as likely to have originated from strikers who had been present at Scene 2. This number includes 134 of the 138 statements classified by the SAHRC lawyers as Scene 2 statements, and 19 others. The 153 statements include 148 from arrested strikers who were being held in custody at police stations,⁵⁴ as well as five statements from strikers in hospital.

Evidence of possible unreliability

Twenty-nine of the 153 statements (19%) were eventually excluded from the analysis because they had features indicating that they might be unreliable. Some of these statements contained assertions that were inconsistent with the evidence before the commission. For example, nine statements contained the obviously untrue assertion that strikers were unarmed or (for instance) had sticks but no spears. Another example of this type of inconsistency was statements that held that police in armoured vehicles (deliberately) drove over strikers fleeing from Scene 1. No deceased or injured strikers

had injuries that were consistent with this allegation. These statements were removed because the assertions that they contained raised questions about the reliability of the witness's overall account.

Not all of the statements with factually incorrect assertions were removed from the sample. For example, 20 of the 153 statements alleged that soldiers had been involved in the police operation at Marikana. No South African National Defence Force (SANDF) members were involved in the ground operation, but one of the SAPS units that were deployed, the Special Task Force (STF), wears military type camouflage uniforms and uses vehicles that are painted similarly to military vehicles. These personnel could reasonably be mistakenly identified as military personnel.

The review of statements also took into account the possibility that the strikers had collaborated in preparing their statements to ensure that they corroborated each other (known as homogenisation).⁵⁵ Homogenisation is identifiable when very similar language is used in different statements. However, no evidence of collaboration was identified. A series of four statements, taken by a single statement taker on 19 August 2012, showed a high level of similarity in terms of language and structure, although not in relation to all of the allegations that they contained.⁵⁶ The degree of uniformity between these statements may have originated

from the statement taker (see the discussion below). Nevertheless, it raised doubts about the degree to which these statements represented the experience of specific individuals, and they were consequently excluded.

Table 1 summarises the final sample of 153 statements, showing how these were classified in one of four categories based on the type of Scene 2 shooting description (or absence of shooting description) that they provide.

Descriptions of the shootings in the statements

Reframed, absent or truncated information

Virtually all (259 out of 271) of the people arrested by the SAPS at Marikana were arrested at Scene 2.⁵⁷ Police used 295 rounds of live ammunition at Scene 2, making it hard to imagine that anyone at Scene 2 would not have been aware of the shootings. It is reasonable to expect, therefore, that almost all of the statements from arrested miners should provide information about Scene 2. Yet only 153 of the statements were identifiable as originating from strikers who were at Scene 2. Of these statements more than a quarter (39) contained no description of any shooting (see Table 1). This raises the question as to why there were not more statements that were identifiable as originating from strikers who were at Scene 2 and that provided clear information about the Scene 2 shootings.

Table 1: Classification of statements included and excluded by type of shooting description

Type of shooting description at Scene 2	Present at Scene 2	Excluded due to possible unreliability	Final sample of statements	% of final sample
No Scene 2 shooting described	39	7	32	26%
Scene 2 shot while surrendering	57	11	46	37%
Other Scene 2 shooting description	52	9	43	35%
Shot while surrendering described but unclear if at Scene 1 or Scene 2	5	2	3	2%
Total	153	29	124	100%

A general feature of most of the statements is that they provide an extremely abbreviated account of the events of 16 August 2012, and there is no clear differentiation between the events at Scene 1 and Scene 2. This is consistent with existing knowledge of police statement taking, where statement takers tend to truncate the account provided by victims or witnesses.⁵⁸ Statement takers also frequently reframe the verbal account provided to them in order to capture what they regard as the key salient information. In so doing they decide 'what to include, what to exclude and what precise formulations to use'.⁵⁹ It is worth recalling that the statements were taken as part of an IPID investigation into the events at Marikana. IPID performs an investigative function that resembles police investigation, and many IPID personnel are former SAPS members.⁶⁰ IPID statements are thus likely to have similar characteristics to statements taken by police.

IPID investigators were deployed to the two Marikana crime scenes (i.e. Scene 1 and 2), arriving some hours after the shootings on the 16th.⁶¹ However, it is not clear whether IPID personnel who were involved in statement taking had been informed about the fact that there were two crime scenes (in two distinct places) where shootings had taken place. Many of the statement takers would likely have seen the television footage of the shootings at Scene 1, which created the impression that the massacre had taken place entirely at Scene 1. It was only in the week after the massacre, when the IPID statement taking process was largely complete, that the first media report emerged indicating that there had been two massacre scenes.⁶² Scene 2 was only exposed in the mainstream media two weeks after the massacre.⁶³

Apart from the television coverage, at the time when the statements were taken from the

strikers by IPID personnel there was only one formal account of the massacre in the public domain. This was the statement issued by Phiyega on the day after the massacre, Friday 17 August.⁶⁴ As noted above, this statement had been modified in such a way as to create the impression that the killings had taken place in one continuous flow of events. The fact that many of the statements taken by IPID staff also describe the shootings in this way, may reflect that the statement takers interpreted the narrative accounts provided to them by strikers in terms of the television footage and media statements that they had been exposed to.

These factors are not only relevant to understanding why such a small proportion of statements appear to relate to the events at Scene 2, but may also explain why, even among those statements that do deal with the events at Scene 2, roughly a quarter provide no indication that there were any shootings there. The statement of Mr Mtshamba,⁶⁵ the most widely known of the people who survived the killings at Scene 2, starkly illustrates these issues. Mtshamba was not only the principal small koppie survivor to give evidence before the Marikana Commission⁶⁶ but was also a principal interviewee in the most widely read book about the massacre, and has been featured in television coverage and news articles about Scene 2.⁶⁷ It is, however, not apparent from his IPID statement that he was present at Scene 2. In fact, in the SAHRC Annexure G his statement is classified as one that deals with Scene 1 but not with Scene 2.⁶⁸

Indiscriminate shootings by police

Some statements describe what appears to be indiscriminate shooting by the police, but do not include information about anyone being shot while surrendering. For example, statement A366 describes:

I then realised that we were surrounded by the police [at Scene 1]. We ran to

a big stone (mountain) where we hide ourselves and they were busy shooting at us. I surrendered by raising my hands and [they] instructed me to lie down. I did as instructed. I noticed that in front of me there were ± 10 people lying on the ground shot dead.⁶⁹

Statements in this category also include some in which the Scene 2 shooting is described in a few words, for example: 'The police continued to shoot at us even at where we were hiding and some were killed.'⁷⁰

These statements are of course not inconsistent with the assertion that some strikers were shot while surrendering. Considering the perfunctory nature of some statements it is possible that some strikers in this group were witnesses to shootings during surrender but that this was not captured in their statements. Alternatively, they may have been present at Scene 2, but may themselves not have witnessed incidents of this kind. Given the fact that the shootings took place in different parts of the Scene 2 area, all of the strikers at Scene 2 would not have witnessed exactly the same events.

Allegations of executions

The issue of executions is relevant in relation to Scene 2 partly because two SAPS members provided written statements which said that, while police were searching the Scene 2 area after the shootings, a police officer had shot one of the strikers (neither statement confirms whether the shooting was fatal).⁷¹

The statements were examined in order to establish whether there was evidence in the statements to support these claims, or other evidence of executions. In this process executions were defined as incidents where people who had already been subdued, or who were immobilised by injury, and were 'under the control' of the police, were then killed. By this definition, evidence of shooting

while surrendering is not equivalent to alleged executions. In general, the descriptions that are provided in the statements indicate that, when strikers were shot while surrendering, the police had not as yet established control over them.

There are various confusing aspects about the allegations by the two SAPS members. They emerged more than a month after the massacre. The second SAPS member to make these allegations indicated that it was the SAPS member who had first made the allegations who had admitted to shooting one of the strikers, apparently while the police were arresting strikers after most of the shootings were over. None of the strikers' statements clearly corroborates the account provided by either of these SAPS members. The statements also do not provide consistent evidence of other executions.

Credibility of 'shot while surrendering' allegations

More than a third (46) of the statements contained descriptions of strikers being shot while surrendering. For example, statement A238 indicates that:

We tried to hide ourselves under the big stones but that did not help. We decided to surrender ourselves to the police. People came out and lifted their hands. The first one who came out lifting his hands was shot on the hand but I am not sure which side and if he fell down. The second one was shot on the chest having lifted his hands as well. They were just shooting randomly at us until some of them told others to stop. They then stopped.⁷²

Another example is statement A22:

We ran as a small group and hide ourselves at the mountain. There were police officials who were following us. Some of them were at the back. Some of the people I hid with raised their hand up, begging the police to forgive them. One person who raised

his hand was shot down. Other one also raised his hands and he was also shot down. I saw a lot of bodies lying down there. I heard a voice from the police officials shouting stop. After that I did not hear any gun shot. Most of the people were shot while raising their hands and some were seated down on their hiding place. Most of us were armed with sticks but we dropped them when the police started shooting. They were shooting at us at about \pm 50 m distance.⁷³

Roughly 37 of these statements gave some indication of the number of people they had seen being shot while surrendering. Of these, eight statements clearly referred to one person who they saw being shot while surrendering, three referred to two people, two referred to three people and one referred to four people. Twenty-three statements used terms like 'many' or 'few' to refer to the number of people who were shot. For instance, statement A245 says:

Many people were killed on that spot. Others tried to raise their hands but the police were shooting at them. I lied on the ground while the shooting continued for \pm 20 minutes. I saw one black male raising his hand but the police shot him.⁷⁴

There is evidence that at least one of the men who was shot at Scene 1 tried to raise his hands during the shooting,⁷⁵ and so the fact that a person describes someone being shot while surrendering does not in itself demonstrate that this is a description of events at Scene 2. There are three such statements that originate from people who describe being present at Scene 2, but are unclear whether the SWS incident that is alleged took place at Scene 2. Nevertheless, most of the statements that provide descriptions of people being shot while surrendering are referring to events at Scene 2 and not at Scene 1.

The 124 statements that were retained in the sample for analysis were, at face value, not obviously unreliable. A concern may, however, still exist that the allegations of people being shot while surrendering were themselves not based on the direct experience of strikers, but emerged as a result of 'rumours' that spread among the strikers. It is conceivable that these allegations may have been influenced by a hostile disposition towards the police, or even have been the product of collusion to misrepresent the events at Scene 2 in order to hold police culpable for the killings. After the initial process of excluding statements that had features indicating that they might be unreliable, the research process therefore focused on whether there was reason to suspect that the SWS allegations were the product of collusion between the strikers, or whether there was evidence that the statements were a misrepresentation of the real experiences of the strikers who made them.

Table 2 shows that the statements were all taken in the five-day period immediately after the Marikana massacre. Of the 124 statements, 103 (83%) were taken within the first three days after the massacre and included statements taken at four different locations: one at Pelgerae Hospital, 64 at Bethanie Police Station,⁷⁶ 13 at Jericho Police Station and 21 at Phokeng Police Station. In four cases the locations were not specified. Of the 103 statements taken in the first three days, 32 (31%) contained allegations of shooting while surrendering.

Only one of the 124 statements was taken on Friday the 17th and this did not refer to anyone being SWS. Statement taking got under way more fully, at the Bethanie and Jericho police stations, on Saturday 18 August. At Jericho Police Station seven of the statements that were taken on the 18th provided shooting descriptions and three of these included SWS allegations. Likewise at Jericho three of the seven

Table 2: Dates on which statements were taken

	Date unclear	17 th	18 th	19 th	20 th	21 st	Total
Statements taken	8	1	0	63	0	18	124
Scene 2 SWS	5	0	7	20	2	12	46
% SWS	63%	0%	23%	32%	67%	67%	37%
Location	All Bethanie therefore assumed to be 18 th or 19 th	Pelgerae Hospital	16 Bethanie; 13 Jericho; 2 not specified	40 Bethanie; 21 Phokeng; 2 not specified	2 Phokeng; 1 Marikana Hospital	17 Mogwase; 1 Marikana Hospital	124

statements that were taken on the 18th and that provided shooting descriptions included SWS allegations.

Of the statements taken at both stations on that day from strikers who were apparently at Scene 2, a large number contain no shooting description. This is likely to have been a consequence of the factors discussed above. The available information shows that virtually all of the arrested strikers were arrested at Scene 2 and that it is highly unlikely that people who were present at Scene 2 would not have been aware of the shootings.

More than half of the statements in the sample (52%) were taken from strikers at Bethanie Police Station. It is therefore unsurprising that 50% of the statements that specifically

mentioned shooting while surrendering (23 of 46) were made by strikers at Bethanie Police Station. Nevertheless, SWS allegations emerged from strikers at all four police stations as well as from one of the three strikers in the sample who were in hospital when their statements were taken. Therefore, in the five days after the strike, SWS allegations emerged from strikers at five independent locations (Table 3).

It is also worth noting that 29 different statement takers were involved in taking the 124 statements, and that most of them only took statements at one location. The allegations that strikers were shot while surrendering were therefore recorded by at least 18 of the 29 statement takers (62%), indicating that the evidence of people being shot while

Table 3: Locations at which statements were taken

	Bethanie Police Station	Jericho Police Station	Mogwase Police Station	Phokeng Police Station	Hospitals	Not specified	Total
Statements taken	64	0	17	23	3 ⁷⁷	4	124
Scene 2 SWS	23	3	12	6	1	1	46
% of all 124 statements	52%	10%	14%	19%	2%	3%	100%
% SWS allegations in statements from this location	36%	23%	71%	22%	33%	25%	37%

surrendering did not originate from a small group of IPID staff who misinterpreted the verbal accounts provided by the strikers or deliberately introduced misleading evidence.

Many of the statements also contained allegations of assaults or other vindictive conduct by police against strikers after the shooting. Sixty-nine of the 124 strikers made allegations of this kind, the vast majority of whom asserted that strikers were assaulted at Scene 2 after the shootings were over and they were being rounded up and arrested. Strikers who made allegations of being shot while surrendering were not more likely to allege that they or others had been assaulted (Table 4). This suggests that allegations of being shot while surrendering do not indicate a bias towards making allegations against the police.

Finally, it is worth noting that there were two police officers who claimed in their statements that they had called on other police to stop shooting at the strikers at Scene 2.⁷⁸ Altogether, 14 of the strikers' statements also described police officers calling for other police to stop shooting.⁷⁹ Of these, seven (50%) were statements by strikers who also made allegations of shooting while surrendering. This is a further indication that the SWS allegations represent objective descriptions of the events at Scene 2, and are not evidence of a tendency

towards making unjustified accusations against the police.

Conclusion

This article does not provide a full account of the events at Scene 2, but focuses on the statements taken from injured and arrested strikers, in particular statements indicating that strikers were shot while surrendering.

The analysis shows that these allegations emerged at diverse locations, and from an early stage in the process of recording statements. Ultimately, such allegations would be recorded by 18 different IPID personnel from strikers at five distinct locations in the five days immediately after the massacre. The statements have other features that indicate that those making the allegations were not biased against the police; for example, not over-representing allegations of assault and presenting information that portrayed police in a positive manner.

This analysis supports the SAHRC's assertion that the allegations of being shot while surrendering are not based on collusion 'to produce a false account'.⁸⁰ Considering the circumstances in which these accounts emerged, it is implausible that they reflect an attempt to falsely incriminate the police and suppress alternative information. Taken collectively, these statements can therefore be regarded as a reliable source of information that

Table 4: Percentage of arrested strikers who allegedly experienced or witnessed assaults – classified by type of Scene 2 shooting description

Type of shooting description at Scene 2	No assault	Assault or other vindictive action	Total	% alleging assault or other vindictive action
No Scene 2 shooting described	11	21	32	66%
Scene 2 SWS	23	23	46	50%
Other Scene 2 shooting description	21	22	43	51%
SWS described but unclear if at Scene 1 or Scene 2	1	2	3	67%
Total	56	68	124	55%

some of the strikers at Scene 2 were indeed shot while surrendering.

It is also worth noting that there is not a single reference in any of the statements to strikers shooting at or attacking SAPS members with dangerous weapons at Scene 2, despite such allegations by the police.⁸¹ This supports other evidence that suggests that police claims that they were acting in self-defence when they shot the strikers were false.⁸²

But if they were not attacking the police, why were they shot in this way? Existing analyses of the massacre have focused on political influences, and some have alleged collusion between Lonmin and the police to kill the strikers.⁸³ The evidence presented to the commission does not support the view that this is what motivated the police shootings at Scene 2.⁸⁴ What characterised the leadership of the operation was not any explicitly formed lethal intention, but the recognition of the potential for substantial loss of life and the absence of any significant will or intention to prevent it.⁸⁵

Although it made no findings about the reasonableness or legality of the police shootings, the Marikana Commission did reach at least one significant set of conclusions about the events at Scene 2, namely that there was no effective command and control of the police.⁸⁶ Factors that contributed to the absence of command and control included the neglect of planning and briefing owing to the hasty manner in which the operation was launched,⁸⁷ and blurred lines of command at senior level.⁸⁸ An additional factor that profoundly shaped the manner in which the operation was planned and conducted was that it took place during a period in which Public Order Policing units had fallen into neglect, while the status of the SAPS's militarised 'tactical' units had been elevated and they were being used more frequently in crowd management.⁸⁹

The implication is that the shootings at Scene 2 need to be understood against the backdrop of an absence of command and control of SAPS units that were not well trained in crowd management. At one point during the commission process, the SAPS argued that its members at Scene 2 shot some of the strikers because, having heard gunfire from other SAPS units, they mistakenly believed that they were being fired at by the strikers.⁹⁰ However, given that there were a large number of people gathered in the Scene 2 area, it was reckless to fire without identifying the source of the gunfire and ensuring that innocent people were not endangered. The police could also have withdrawn and taken cover, making such retaliatory fire unnecessary. This strategy, which would have provided police with the time to identify where gunfire was coming from,⁹¹ should have been familiar to the tactical units that were responsible for much of the gunfire at Scene 2.⁹²

One key detail that is not addressed by the statements is whether the strikers who were shot while surrendering were visible to the police who shot them. There is evidence that some of the SAPS shooters fired into the Scene 2 area from locations on the south side.⁹³ It is not clear if the strikers that they were shooting at would have been clearly visible, as they may have been concealed by foliage. However, the evidence also shows that some of the police who fired into the killing zone area were positioned on top of the high rocks.⁹⁴ These police are likely to have been able to see the strikers at whom they were shooting. They would likely have been aware that some strikers had their hands raised while others were taking shelter behind rocks and other available cover. If these police members fired at the surrendering strikers, it raises the possibility that the killings at Scene 2 involved the 'intentional unlawful killing of strikers by SAPS members'.⁹⁵

The motivations of some police for shooting at the strikers likely went beyond believing that they were being fired at. The statements provide evidence that many of the strikers were assaulted after the shootings, which indicates that there was a strong element of vindictive hostility towards the strikers. The shootings by some of the police at Scene 2 were likely strongly influenced by their emotions, which were shaped by the events that had occurred at Marikana on that day and over the preceding week.⁹⁶ This article shows that whether or not anyone is eventually convicted for these acts, the evidence from the strikers' statements points to the fact that a serious crime was committed by police at Scene 2.



To comment on this article visit

<http://www.issafrika.org/sacq.php>

Notes

- 1 Marikana Commission of Inquiry, Written submissions of the South African Human Rights Commission [SAHRC] regarding 'phase one', 29 October 2014, 474.
- 2 Thembinkosi Gwelani, who was killed at Scene 1, was an unemployed man who had come to Marikana looking for work. See Marikana Commission of Inquiry, Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West province, 31 March 2015, 261–262.
- 3 South African History Online, Marikana massacre 16 August 2012, <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 9 September 2017).
- 4 Marikana Commission, Report, 110–175.
- 5 IPID is an independent government agency responsible for investigations into certain categories of alleged or possible criminal conduct by the police, including deaths as a result of police action. See Independent Police Investigative Directorate Act 2011 (Act 1 of 2011), section 28(1)(b).
- 6 Marikana Commission of Inquiry, Heads of argument of evidence leaders, 27 October 2014, 41–44, 92, 665–668.
- 7 G Marinovich, *Murder at the small koppie*, Cape Town: Penguin, 2016, 40, 51.
- 8 The members of the tripartite alliance are the African National Congress, the Congress of South African Trade Unions and the South African Communist Party.
- 9 Marikana Commission, Heads of argument of evidence leaders, 546–547.
- 10 N Makhbu, Marikana miners were killers – Zuma, *Pretoria News*, 24 June 2015, <https://www.iol.co.za/news/crime-courts/marikana-miners-were-killers---zuma-1875560> (accessed 24 October 2017).
- 11 Marikana Commission, Report, 42; D Bruce, Summary and analysis of the report of the Marikana Commission of Inquiry, Council for the Advancement of the South African Constitution, 2015, 19–20, <https://www.casac.org.za/wp-content/uploads/2015/02/Summary-and-Analysis-of-the-Report-of-the-Marikana-Commission-of-Inquiry.pdf> (accessed 11 September 2018).
- 12 See the following Marikana Commission of Inquiry exhibits: Exhibit UUUU10.3, Annexure V2 – Video presentation on the movement of strikers from koppie to the kraal [FINAL]; Exhibit UUUU10.4, Annexure V3 – Video presentation on the use of water canon before Scene 1 [FINAL]; Exhibit UUUU10.5, Annexure V4 – Video presentation on the use of tear gas and stun grenades at and around Scene 1 [FINAL]; Exhibit UUUU10.6, Annexure V5 – Video presentation on the shots fired at Scene 1 [FINAL].
- 13 S Mabena, Marikana massacre: cry for justice, five years on, *Times Live*, 15 August 2017, <https://www.timeslive.co.za/politics/2017-08-15-marikana-massacre-cry-for-justice-five-years-on/> (accessed 24 October 2017).
- 14 *News 24*, Phiyega can't be Marikana scapegoat – Cope, 4 December 2016, <http://www.news24.com/SouthAfrica/News/phiyege-cant-be-marikana-scapegoat-cope-20161204> (accessed 24 October 2017).
- 15 Marikana Commission, Report, 367, 520–21; D Bruce, *Commissioners and commanders: police leadership and the Marikana massacre*, Pretoria: Institute for Security Studies (ISS), 2016.
- 16 Marikana Commission of Inquiry, Report, 505–510; Marikana Commission of Inquiry, Heads of argument on behalf of injured and arrested person, 219–221.
- 17 G White, Supplementary statement of Gary White MBE, Marikana Commission of Inquiry, Exhibit BBBB4, 21 June 2014.
- 18 B Dixon, A violent legacy: policing insurrection in South Africa from Sharpeville to Marikana, *The British Journal of Criminology*, 55:6, 2015, 1131–1148, 1144.
- 19 R Collins, *Violence: a micro-sociological theory*, Princeton: Princeton University Press, 2008.
- 20 Marikana Commission, Report, 309–312.
- 21 There are 48 identified SAPS shooters, but this figure excludes the SAPS members who fired buckshot pellets at the strikers. See Marikana Commission, Report, 259–261.
- 22 The police who fired buckshot at the strikers appear to have fired from a slightly different location. See *ibid.*
- 23 *Ibid.*, 248.
- 24 *Ibid.*, 257.
- 25 S Naidoo and J Steyl, Final report: Marikana mining incident 16th August 2012: integration of scene, ballistic & medical evidence at Scene Two, 26 May 2014, Annexure E.
- 26 Roughly 305 live rounds were fired during the fatal barrage of gunfire at Scene 1. At Scene 2, 295 live rounds were fired.
- 27 Mr Mkhonjwa, who was the first to be shot, was shot at approximately 16h09 (See Marikana Commission of Inquiry, Families' heads of argument, 3 November 2014, 378); Mr Mpumza, who was the last to be killed, was killed at 16h19:29 (Marikana Commission of Inquiry, Heads of argument of evidence leaders, 483).
- 28 The evidence leaders' heads of argument say that 121 cartridges out of the 295 allegedly fired (41%) were found (See Marikana Commission, Heads of argument of evidence leaders, 488). Annexure C of the report of the independent ballistic and medical experts, however, only deals with data on the location at which 85 cartridges (29%) were found.
- 29 See, for example, Independent Police Investigative Directorate (IPID) statement A245, Bethanie Police Station, 18 August 2012.
- 30 Marikana Commission, Report, 271.
- 31 Marikana Commission, Heads of argument of evidence leaders, 447–449.

- 32 See Marikana Commission, Families' heads of argument, 320–411; Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 463–472.
- 33 The commission refers to 10 people being killed in this area. The figure of 11 is based on the inclusion of Mr Xalabile in this group. The location at which two of the people who died later had been shot is not known.
- 34 Marikana Commission, Report, 271.
- 35 Marikana Commission of Inquiry, Exhibit JJJ6, Capt. Nel photos 1234–1242, 16 August 2012.
- 36 Marikana Commission, Report, 316.
- 37 Marikana Commission, Heads of argument of evidence leaders, 601–606.
- 38 Claassen Board of Inquiry, Report of the Board of Inquiry into allegations of misconduct against the National Commissioner: Mangwashi Victoria Phiyega, 21 October 2016, 66–67.
- 39 Marikana Commission of Inquiry, Exhibit FFF5, General Phiyega pronounces on mine unrest, media statement from the South African Police Service, 17 August 2012.
- 40 Marikana Commission of Inquiry, Exhibit FF4, Undated two page PDF file with title 'Internal unrest incident: Lonmin mine: North West Province: Internal brief'.
- 41 Marikana Commission of Inquiry, Exhibit L, South African Police Service: Mine unrest at Lonmin, Marikana – history and build-up, 231–233.
- 42 Marikana Commission, Report, 316.
- 43 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 59–119; G White, Final statement of Gary White MBE, Marikana Commission of Inquiry, Exhibit JJJ178, 4 October 2013, 75.
- 44 Marikana Commission, Report, 327–328. The investigation is also supposed to look into the possibility that some shootings at Scene 1 had 'exceeded the bounds of private defence' (ibid., 545–6).
- 45 ANA Reporter, Ipid submits last Marikana docket to NPA, *IOL News*, 22 August 2017, <https://www.iol.co.za/news/south-africa/ipid-submits-last-marikana-docket-to-npa-10898093> (accessed 21 July 2018); Marikana Commission, Report, 327, 546.
- 46 Dixon, A violent legacy, 1–2.
- 47 The only prosecution of police that has been implemented for the 16th is for failing to disclose the fact that one of those who had died, had died in a police vehicle. See M Thamm, Marikana massacre: IPID investigates massacred miners' deaths, and SAPS' lies, without the promised funding, *Daily Maverick*, 30 August 2018.
- 48 Naidoo and Steyl, Final report.
- 49 This was not available for Scene 1.
- 50 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 474. Some testimony about strikers being shot while surrendering was presented to the commission by one of the witnesses, but no reference is made to this evidence in the report of the commission, possibly owing to concerns about its reliability.
- 51 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', Annexure G.
- 52 D Bruce, *The sound of gunfire: the police shootings at Marikana Scene 2*, 16 August 2012, Pretoria: ISS, August 2018.
- 53 On the latter point see, for instance, IPID statements A30 and A269.
- 54 The location at which four statements were taken was not recorded. These statements were, however, part of the group of statements that were taken at police stations.
- 55 The Law Horse, I can't accept the police's disproportionate influence in court, *Legal Cheek*, 24 May 2012, <https://www.legalcheek.com/2012/05/criminal-barrister-i-cant-accept-the-polices-disproportionate-influence-in-court/> (accessed 21 July 2018).
- 56 IPID statements A343–A346, Phokeng Police Station, 19 August 2012.
- 57 Marikana Commission, Exhibit L, 2 and 263. Exhibit L appears to indicate that no one was arrested at Scene 1.
- 58 C van Veenendal, 'I never said that': current problems in statement taking from a juridical point of view, *Institute for Human Rights & Criminal Justice Studies*, Technikon SA, 1998.
- 59 FE Rock, The genesis of a witness statement, *International Journal of Speech, Language and the Law*, 8:2, 2001, 44–72, 60.
- 60 D Bruce, Strengthening the independence of the Independent Police Investigative Directorate, African Policing Civilian Oversight Forum (APCOF), Policy Paper, 16 February 2017, <http://apcof.org/wp-content/uploads/2017/03/016-strengthening-the-independence-of-the-independent-police-investigative-directorate.pdf> (accessed 30 August 2018).
- 61 Marikana Commission, Heads of argument of evidence leaders, 621.
- 62 T Lekgowa, B Mmope and P Alexander, How police planned and carried out the massacre at Marikana, *Socialist Worker*, 2317, 21 August 2012, <https://socialistworker.co.uk/art/28868/How+police+planned+and+carried+out+the+massacre+at+Marikana> (accessed 17 April 2017).
- 63 G Marinovich, The murder fields of Marikana. The cold murder fields of Marikana, *Daily Maverick*, 30 August 2012.
- 64 Marikana Commission of Inquiry, Exhibit FFF5.
- 65 Marikana Commission of Inquiry, Exhibit MMMM3, IPID statement A249, Bethanie police station, 19 August 2012.
- 66 Mr Phatsha, who gave evidence in February 2013, also described events at Scene 2. See Marikana Commission, Transcript Day 50 (20 February 2013, Phatsha), 2013, 5440–5442, 5676–5677.
- 67 Marinovich, *Murder at the small koppie*; Marikana Commission of Inquiry, Exhibit MMMM2; *Carte Blanche*, Interview with Mr Mtshamba, video, part one and part two, undated; N Tolsi, Marikana then and now: a tragedy that keeps unfolding, *Mail & Guardian*, 18 August 2017, <https://mg.co.za/article/2017-08-18-00-marikana-then-and-now-a-tragedy-that-keeps-unfolding> (accessed 9 September 2017).
- 68 His statement is IPID statement A249, Bethanie Police Station, 19 August 2012. See Marikana Commission, Written submissions of the SAHRC regarding 'phase one', Annexure G, 46.
- 69 IPID statement A366, Phokeng Police Station, 19 August 2012.
- 70 IPID statement A153, Mogwase Police Station, 21 August 2012.
- 71 Warrant Officer H Myburgh, Statement, Marikana Commission of Inquiry, Exhibit KKK7, 15 October 2012; Warrant Officer J Swart, Supplementary statement, Marikana Commission of Inquiry, Exhibit LLL14, undated; Marikana Commission, Heads of argument of evidence leaders, 597–601.
- 72 IPID statement A238, Bethanie Police Station, 18 August 2012.
- 73 IPID statement A22, Bethanie Police Station, 19 August 2012.
- 74 IPID statement A245, Bethanie Police Station, 18 August 2012.
- 75 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 378.

- 76 This figure includes the eight statements that were not dated. Because they were taken at Bethanie Police Station it was assumed that they had been taken on the 18th or 19th.
- 77 According to Annexure G, statements 2–21 were all taken in hospitals. The locations given in the three statements that are identified as dealing with events at Scene 2 are Pelgerae (statement A5), Wonderkop (A17) and 'Marikana' (A12). The Wonderkop Hospital is located at the Lonmin mine and is also referred to as the Marikana Hospital.
- 78 Lieutenant Colonel C Gaffley, Statement, Marikana Commission of Inquiry, Exhibit FFF10, 16 October 2012; Warrant Officer MP Mamabolo, Supplementary statement, Marikana Commission of Inquiry, Exhibit KKK60, 20 January 2014.
- 79 Examples of this can be found in the quotes from statements A238 and A22 above in this article.
- 80 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 474.
- 81 Marikana Commission, Exhibit FFF5; Marikana Commission, Exhibit L, 231–233.
- 82 Bruce, *The sound of gunfire*, 37–38, 84, 85.
- 83 Marikana Commission, Heads of argument on behalf of injured and arrested person, 221.
- 84 Marikana Commission, Report, 510.
- 85 Bruce, *Commissioners and commanders*, 41–47.
- 86 Marikana Commission, Report, 309–312.
- 87 *Ibid.*, 329–387.
- 88 Bruce, *Commissioners and commanders*, 41–47.
- 89 M Marks and D Bruce, Groundhog Day? Public order policing twenty years into democracy, *South African Journal of Criminal Justice*, 27:3, 2014.
- 90 Marikana Commission of Inquiry, Opening statement on behalf of the South African Police Service, Exhibit FFF9, undated (2012), 19 para 45.5.
- 91 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 399–401.
- 92 SAPS units that discharged their weapons at Scene 2 included members of the National Intervention Unit, Tactical Response Team, dog (K9) units from the North West province, and members of Public Order Policing (See Bruce, *The sound of gunfire*, 28).
- 93 These are positions 13, 14 and 15 in the independent forensic and ballistic report (Naidoo and Steyl, Final report). In the report they describe these positions as being on the east side (*ibid.*, 16).
- 94 Naidoo and Steyl, Final report.
- 95 Marikana Commission, Written submissions of the SAHRC regarding 'phase one', 474–475.
- 96 Bruce, *The sound of gunfire*, 90–91.

A missing link in the Traditional Courts Bill 2017

Evidence obtained through human rights violations

Robert Doya Nanima*

rnanima@gmail.com

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a5268>

The issue of admission of evidence obtained through human rights violations is central to a criminal justice system as a mechanism through which to prevent overzealous prosecution by the state and ensure protection of human rights. As such, any court that deals with criminal cases has to evaluate evidence before it is admitted. This article argues that the Traditional Courts Bill (TCB)¹ does not provide for a mode of dealing with evidence obtained as a result of human rights violations. To substantiate this argument, the article reviews the current Bill, and reflects on the challenges that arise with regard to evidence obtained in this way. The article contextualises section 35(5) of the Constitution of the Republic of South Africa, and discusses the practical difficulties of applying it under the current Bill. The article concludes with recommendations for measures that can ensure that accused persons are not prejudiced when appearing before the court.

Much has been written on the Traditional Courts Bill (TCB), focusing in particular on the need to balance the law and tradition, as well as issues of legal pluralism in South Africa, and offering a comparative analysis of various aspects of traditional leaders' role in justice and crime prevention.² There is a wealth of literature on the application of section 35(5) of the Constitution of the Republic of South Africa, yet insights on its application to traditional courts remain a grey area.³ The attempts by the Executive to formalise the operation of traditional courts, and use the Bill of Rights as a foundational principle, point to the need for a clear framework on how

to deal with evidence obtained as a result of human rights violations.

Jurisprudence on the application of section 35(5) of the Constitution requires that the collection of evidence before a trial meet certain criteria. For instance, an accused should be informed of the right to legal representation before s/he is charged.⁴ Furthermore, s/he should not be subjected to torture or inhuman treatment to extract evidence.⁵ The right to a fair trial has constitutional safeguards that include an accused's right to be informed promptly of the charge against him or her,⁶ the right to remain silent,⁷ and the consequences of not remaining silent.⁸ In addition, s/he should not be compelled to make a confession or admission

* Robert Doya Nanima is a lecturer and a doctoral candidate in the Faculty of Law at the University of the Western Cape.

that could be used in evidence against him or her,⁹ s/he should be brought to court within 48 hours,¹⁰ and be presumed innocent until proven guilty.¹¹ It follows that if an investigating authority disregards these safeguards while collecting evidence, a violation of the constitutional rights of the accused occurs. The problem with the TCB in its current formulation (as will be shown later) is that the traditional courts will not adjudicate cases investigated by the police. This sets up an environment for the violation of an accused's rights by any person or entity involved in the pre-trial investigations before s/he is brought to a traditional court.

If the pre-trial investigations are not placed into perspective, the TCB's objective to apply the Bill of Rights in traditional courts is defeated. There is no available literature on how the existing or revised (prospective) traditional courts will deal with admission of evidence that has not been collected by a formal investigative agency such as the police. The human rights of an individual have to be respected, and as such, how evidence was collected during the pre-trial stage should be scrutinised.¹² This article evaluates how the TCB deals with evidence obtained through human rights violations in relation to section 35(5) of the Constitution.

The TCB's formulation of the operation of traditional courts contains a number of key points. Firstly, the parties that seek to appear before the traditional courts need to do so voluntarily and with consent.¹³ Secondly, the traditional courts should incorporate the notion of living customary law, which is developed by the people who practise it and live by its norms.¹⁴ Thirdly, the TCB should protect against discrimination by encouraging full participation of all members of a community, regardless of gender.¹⁵ The defining feature of these arguments is the need for a progressive development of customary law through a

traditional court's jurisdiction in the cases it adjudicates.

Much of the current debate about traditional courts has been centred on whether these courts should have jurisdiction over both criminal and civil cases, and the jurisdictional boundaries of individual courts.¹⁶ However, commentators have not yet addressed the issue of admission of evidence that is obtained unconstitutionally. The fact that the traditional courts have criminal jurisdiction subjects them to section 35(5) of the Constitution. We therefore urgently need a conversation about the admission of such evidence as part of the deliberations on this Bill.

Review of the Traditional Courts Bill in relation to evidence obtained through human rights violations

The current TCB does not contain any clause that determines how evidence should be collected or admitted. The clause that most closely addresses evidence states that '[t]he customary law of procedure and evidence applies in traditional courts'.¹⁷

This provision sets out the law of evidence and procedure as customary law, but does not articulate what the content of such customary law is. This poses a danger, as the application of customary law is consequently left open to the subjective definitions of a given community.¹⁸

The complexities of customary law arguably stem from the system of legal pluralism.¹⁹ South Africa has various customary laws for its diverse groups of people.²⁰ While this clause ensures the applicability of different customary laws in different communities, its subjectivity also presents some dangers in application.

Because the TCB has no provision for dealing with evidence obtained through human rights violations, it raises questions as to how section 35(5) would be applied. This section provides:

Evidence obtained in a manner that violates any right in the bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.²¹

This section presents a constitutional directive that requires a court to exclude evidence obtained through human rights violations, subject to either of two conditions: firstly, where this admission renders a trial unfair, and secondly, where it leads to a maladministration of justice.²² The court only exercises its discretion not to admit evidence after subjecting it to these two conditions, which provide objective criteria that are used to interpret this provision.²³

The clause in the TCB that requires application of the customary law of procedure and evidence in traditional courts requires a traditional leader to subject the pre-trial facts to the objective criteria under section 35(5). The challenge is that under the current formulation of the TCB, the traditional court neither adjudicates cases investigated by the police nor offers any alternative option for conducting investigations. As such, a traditional leader may depart from the objective criteria under section 35(5) because there is no investigative body that will be subjected to this inquiry.

The subjective application of customary law, when viewed against the objective criteria under section 35(5), is bound to violate the right to equality.²⁴ This violation occurs when customary laws are applied differently to similar facts, just because those facts are presented before different traditional courts in different communities. Consider a hypothetical situation, where different communities apply different consequences for theft or assaults. The severity of these consequences may differ greatly, illustrating how inequalities may result from different customary laws being applied.

The universal application of section 35(5) is bound to curb the discretion that the traditional leaders in these community courts currently use in settling issues. As such, we can see how a subjective application of section 35(5) on communities violates the right to equality.²⁵

The memorandum of the TCB sets out that the guiding principles for the proposed court require an interpretation of the Bill of Rights in a manner that promotes the values that 'underlie an open and democratic society, based on human dignity, equality and freedom'.²⁶ To make this principle real in criminal cases would require that the subjective variability of customary law be tempered through the application of the more objective criteria under section 35(5) of the Constitution.

Another guiding principle in the memorandum requires that the traditional courts interpret 'any legislation; and when developing the common law or customary law', promote the spirit, purport and objects of the Bill of Rights.²⁷ While the development of common law is beyond the scope of the proposed courts, the development of customary law under this new genre of formal courts must provide clarity on the admissibility of evidence obtained through human rights violations. This involves developing normative rules in the TCB that ensure that there is a proper process of investigating cases that upholds the right to a fair trial. Customary jurisprudence that engages the objective criteria under section 35(5) should also be developed organically. Where such clarity cannot be given, the basis for the development of living customary law is not adequately grounded.²⁸

The requirement that the traditional courts do not adjudicate cases that have been investigated by the police creates grounds for the possible violation of an accused's pre-trial rights.²⁹ The lack of clarity on how such cases

are investigated exacerbates the problem. While the TCB seeks to uphold the spirit of the Bill of Rights, its lack of insight on how the traditional courts will deal with issues around the collection and admission of evidence poses a potentially dangerous predicament. As such, it is hard to guarantee that the admissibility of evidence obtained through human rights violations will be minimised.³⁰ The subjective application of a customary law procedure would likely be in conflict with the application of the objective criteria under section 35(5).

One may argue that traditional courts should be bound to the same rules as any other court and as such, pre-trial investigations do not necessarily protect an accused's pre-trial rights and the subsequent admission of evidence. While this may be true, the accused in a traditional court hearing might only receive protection once a superior court such as the High Court reviews the judgment of the traditional court – which might only be established after an innocent person's time has been wasted and his or her resources squandered, or credit injured.³¹ Principles that are developed by the traditional courts on how to deal with evidence obtained through human rights violations may be subjected to review by the High Court,³² which will create greater case backlogs in the already stretched high courts across South Africa.³³

The reference to the application of the Bill of Rights by the traditional courts is based on two key considerations: firstly, that women are accorded full and equal participation when they are before the court,³⁴ and secondly, that there should be no discrimination against vulnerable persons such as children, the elderly, youth, the indigent and persons with disabilities, or on the basis of sexual orientation or gender identity.³⁵ However, applying the Bill's current general procedural and substantive aspirations, without considering the nature of the evidence

that is being admitted, will result in further discrimination, because such evidence violates one's right to a fair trial under section 35(5) of the Constitution.

Technical aspects such as evidence obtained through human rights violations, which would normally be picked up by a lawyer, are not easily identified in the traditional court environment because of the exclusion of legal representation in the proposed courts.³⁶ Subjecting traditional courts to the same rules as common law courts fails because of peculiarities such as these, for example the lack of legal representation and the fact that cases are adjudicated by untrained officers. Jurisprudence, however, indicates that customary law should not be recognised at the expense of human rights violations.³⁷ The tensions inherent in the technical aspects of trials in traditional courts can only be resolved if both these courts and contemporary courts are required to apply the Bill of Rights consistently.

As noted earlier, the application of section 35(5) of the Constitution requires a practical evaluation of how unconstitutionally obtained evidence affects the fairness of a trial of an accused, or impacts the court's administration of justice.³⁸ With the Bill of Rights as the foundation of the application of the TCB, section 35(5) requires that a framework be provided under the TCB to speak to the collection and admission of evidence. These principles are easily resolved in other courts because investigation processes routinely question how evidence is collected and then subsequently admitted in court.³⁹ An example of such a procedure is a trial within a trial, which tests the voluntariness of the collection of the evidence. This kind of mechanism is not evident in the TCB.⁴⁰

Evidence that is obtained through human rights violations likely does not fit within the larger framework that guides the operation of the proposed traditional courts under the TCB.

The drafters may also have had no intention to apply section 35(5) to the traditional courts. But these two arguments point to a dangerous predicament.

Firstly, there will be a selective application of the Bill of Rights by the traditional courts. This will defeat the purpose of the TCB, which seeks to eliminate any abuse in the prospective traditional court process, to protect the public interest, and to ensure accountability.⁴¹ These kinds of abuses of the traditional courts were illustrated in the case of *Buyelekhaya Dalindyebo v S*,⁴² where the king of the abaThembu, Dalindyebo, was sentenced to 12 years' imprisonment for crimes he committed against his subjects in the former Transkei. Dalindyebo claimed that he was exercising his authority as the king in enforcing law and order.⁴³ Consider a hypothetical where Dalindyebo presided over these criminal cases in a traditional court under the TCB. An application of section 35(5) of the Constitution would expect that Dalindyebo (as the investigator) would be questioned as to how he had collected the evidence and adduced it in the traditional court. Furthermore, he would have to make a decision with regard to the admissibility of this evidence by scrutinising its effect on the fairness of a trial or the disrepute on the administration of justice.

The introduction to the *Dalindyebo* appeal in the Supreme Court of Appeal is instructive in how it shows a distaste for the violation of civil liberties that the case illustrated:

Imagine a tyrannical and despotic king who set fire to the houses, crops and livestock of subsistence farmers living within his jurisdiction, in full view of their families, because they resisted his attempts to have them evicted, or otherwise did not immediately comply with his orders. Imagine the king physically assaulting three young men so severely that even his henchmen could not bear to watch.

Imagine the same king kidnapping the wife and children of a subject he considered to be a dissident in order to bend the latter to his will.⁴⁴

The Supreme Court of Appeal's confirmation of the convictions is evidence that constitutional values cannot be sacrificed at the altar of customary expedience.

Secondly, the prospective traditional courts are not expected to handle cases that are being investigated by the police. The relevant clause provides that 'a traditional court may not hear and determine a dispute which ... is being investigated by the South African Police Service'.⁴⁵

However, under the TCB these courts may handle common criminal cases such as theft, breaking and entering, assaults, receiving stolen property and malicious damage to property.⁴⁶

This indicates a lack of clarity about how traditional leaders should handle these kinds of cases. A literal interpretation shows that the investigation of a case by the police neutralises the jurisdiction of the traditional court. Where the traditional court handles a case that has not been subjected to any investigation, two scenarios arise. On the one hand, a traditional leader may apply local traditional law subjectively and based on local practice, using his discretion to decide on the fate of an accused in a case before him without paying regard to any particular rules or principles.⁴⁷ The alternative, objective approach would require that the traditional leader uses established rules (for example under section 35(5)) to evaluate the facts before exercising discretion to admit the evidence. Under the Bill's current formulation, both decisions are improper. While the subjective application likely leads to the absence of a fair trial, the objective application of the criteria under section 35(5) may erode the integrity of the customary law of a given community.

The TCB's current formulation advocates for the subjective approach. However, an objective approach would improve the quality of decisions because it would contextualise the traditional courts' collection, and subsequent admission, of such evidence. The current Bill does not offer a framework for such an approach. The lack of an investigative mechanism for the investigation of cases (such as the police) affects the ways that courts can use the evidence that is collected, because it may be prejudicial to the accused.⁴⁸

Thirdly, under the proposed TCB the courts may only exercise their jurisdiction where the parties consent to it. Where the voluntariness of such consent is not adequately evaluated, the Bill does not offer a sufficient measure to deal with possible abuse of the court process. It may be that the traditional leader, as a presiding officer, is involved both in the investigation of the allegations and in decisions around the admission of evidence.⁴⁹ Although his engagement may be well intentioned, his involvement may create the perception of an unfair trial for the accused. This is in contrast to the contemporary judicial system that does not allow judicial officers to investigate and adjudicate a case. The customary practice opens the risk that traditional courts may admit evidence that is unfairly obtained.

In essence, then, the traditional leader may act as investigator and judge in the same case. This creates a possibility of bias on his part. Since he is not an investigative entity like the police, he runs the risk of acting like a vigilante.⁵⁰ In such cases, it makes it harder to use the objective criteria under section 35(5).

The traditional court's exercise of its jurisdiction does not draw a clear line between the investigation and adjudication of cases. Consequently, cases that are not investigated by the police will most likely be adjudicated by the traditional courts, with no formalised rules or

principles. As such, there may well be a possible admission of evidence that violates the rights of an accused. Although the TCB envisages traditional courts presiding over cases such as assaults and petty thefts, even these 'simple' cases have real effects on individuals. It may be that a result is viewed as synonymous with a conviction, even though it is intended to be of a reconciliatory or compensatory nature.

The context of section 35(3) of the Constitution

Section 35(5) presumes that evidence is admissible unless it renders a trial unfair, or is detrimental to the administration of justice.⁵¹ Jurisprudence on this section has developed around issues of pointing out suspects, illegal searches, illegal surveillance, autoptic evidence, and evidence obtained through the improper treatment of witnesses.⁵² The violation of these rights is most often perpetrated by the police or investigative bodies that are involved in the collection of evidence.⁵³ The question here is how evidence obtained through human rights violations fits into the bigger picture of how the proposed traditional courts operate under the TCB.

The Bill of Rights underscores rights such as the right to freedom and security of the person, privacy, expression and movement, and the right to a fair trial.⁵⁴ An accused may also exercise the right to remain silent once s/he has been informed of the charge against him or her.⁵⁵ Other guarantees include the right not to be compelled to make a confession or admission that could be used in evidence against an accused; the right to be brought to court within 48 hours; and the right to be presumed innocent until proven guilty.⁵⁶ All of these protections safeguard against the violation of an accused's rights.

The police, as the chief investigating authority, are expected to respect these safeguards. Case law shows that section 35(5) extends to

other individuals in a similar capacity. Two cases illustrate this position. *S v Songezo Mini and 4 others (Mini)* subjected the evidence obtained by security officers to scrutiny in terms of section 35(5) before admitting it.⁵⁷ In *S v Hena*, the court held that section 35(5) also applies to situations where the police abdicate their statutory duty to investigate crimes by subcontracting the task to anti-crime committees that gather evidence by seriously and deliberately violating the constitutional rights of an accused person.⁵⁸ Research has also shown that vigilantes are used in this way, in other words, to take on the role of the police to collect evidence or investigate cases.⁵⁹ Taken together, these cases show that other groups, whether lay persons or security operatives (like guards), have to ensure that the law is not abused. Traditional leaders who collect evidence in the course of presiding over a traditional court, may act, or be at risk of being viewed, as vigilantes in doing so. They must therefore be subject to the same constraints on their methods.

The laws of procedure should not be limited to customary law, but to other laws of evidence, civil and criminal procedure where applicable. As noted earlier, the current formulation of the TCB does specifically mandate that section 35(5) should apply in customary courts because it only requires that the customary law of procedure shall apply to traditional courts.⁶⁰ The TCB therefore provides an enabling environment for the traditional courts to disregard the police in the investigation of cases. The possible rights violations that may result must be carefully considered.

The process of admission of evidence is a technical aspect of the administration of justice, and requires that traditional leaders appreciate these concepts. In *S v Zuko*,⁶¹ the court provided four factors that may form the basis for refusing to admit certain evidence. These are: a lack of good faith on the part of vigilantes;

an inability to justify their conduct in terms of public safety or emergency; the seriousness of the violation of the appellants' rights to privacy, freedom and security of person and dignity; and, finally, the availability of lawful means to acquire the evidence. Since these factors enhance the right to a fair trial right from the pre-trial stages,⁶¹ the persons collecting evidence should be able to appreciate the consequences that arise from their actions. As such, if an individual is going to collect evidence, s/he ought to know that failing to follow the required procedure, and violating the provisions in the Bill of Rights in the course of collecting evidence, will lead to its probable exclusion.

Conclusion and recommendations

The failure to create a framework for the collection and admission of evidence in the TCB dents the proposed fusion of the Bill of Rights as the cornerstone to the proposed law. In the long run, empirical research on the rules governing the collection and admission of evidence in criminal cases is needed to establish how traditional courts fare in this regard, and how a fusion of section 35(5) may be applied.

In the interim, if the quality of evidence that is admitted in the traditional courts is to match the constitutional directive under section 35(5), criminal cases should be left to the normal courts, unless the parties categorically wish to use the traditional courts. For this to happen, both parties have to be willing to use the traditional courts. However, customary law at times requires that a person follow it, regardless of his perceptions. Consider a hypothetical where A is wrongly accused of malicious damage to the property of B. As such, A is required to come to the traditional court for either reconciliation or paying compensation, as a way of averting possible imprisonment in the magistrates' court. The evidence used to incriminate A may violate his rights to a fair

hearing and the presumption of innocence. Such a scenario illuminates a consent that may be obtained through undue influence by B – perhaps facilitated or supported by the traditional court. This position pits A against the desires of B, in a court they would not have originally gone to. As a result, the outcome of the matter in the traditional court is, to a great extent, based on evidence obtained through human rights violations.

If criminal cases are to be handled by the traditional courts, the police should play an oversight role to ensure that the evidence used is properly obtained and admitted – albeit in an informal manner. Traditional leaders ought to have some training on how to interrogate the nature of the evidence that is brought before their courts, to ensure that the protections against discrimination extend to ensuring that evidence that is admitted is properly collected.



To comment on this article visit

<http://www.issafrika.org/sacq.php>

Acknowledgement

Many thanks to Ms Angela N Mutema and the anonymous reviewers for their valuable insights on the drafts.

Notes

- 1 Traditional Courts Bill of 2017 (B1-2017, or TCB).
- 2 The TCB has been introduced in Parliament four times since its inception in 2008. The most recent attempt was in December 2016 as B1-2017. Some of the emanating literature include P Holomisa, Balancing law and tradition: the Traditional Courts Bill and its relation to African systems of justice administration, *South African Crime Quarterly*, 35, 2011, 17–21; DS Koyana, *Customary law in a changing society*, Cape Town: Juta and Co Ltd, 1988; C Rautenbach, Deep legal pluralism in South Africa: judicial accommodation of non-state law, *The Journal of Legal Pluralism and Unofficial Law*, 42:60, 2010, 143–177; CB Soyapi, Regulating traditional justice in South Africa: a comparative analysis of selected aspects of the Traditional Courts Bill, *PER/PELJ*, 17:4, 2014, 1441–1469; B Tshehla, Here to stay: traditional leaders' role in justice and crime prevention, *South African Crime Quarterly*, 11, 2006, 15–20.
- 3 LT Andrew and N Susan, Improperly obtained evidence in the Commonwealth: lessons for England and Wales?, *International Journal of Evidence and Proof*, 11, 2007, 75–105; JD Mujuzi, The admissibility of evidence obtained as a result of violating the accused's rights: analysing the test set by the Hong Kong Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*, *International Journal of Evidence and Proof*, 16, 2012, 425–430 (the text states that there is a wealth of literature on the application of section 35(5) of the Constitution but this does not support that. Need South African literature to either support the claim or acknowledge the gap with regard to traditional courts).
- 4 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 35.
- 5 *Ibid.*, section 35(3)a.
- 6 *Ibid.*, section 11(2).
- 7 *Ibid.*, section 35(3)h.
- 8 *Ibid.*, section 35(1)a.
- 9 *Ibid.*, section 35(b)a.
- 10 *Ibid.*, section 35(1)c.
- 11 *Ibid.*, section 35(3)h.
- 12 This informs the need to evaluate the application of section 35(5) – a crucial section in the Bill of Rights.
- 13 T Duda, How MPs are pushing back against the Traditional Courts Bill, *BusinessDay*, 28 March 2018, <https://www.businesslive.co.za/bd/opinion/2018-03-28-how-mps-are-pushing-back-against-the-traditional-courts-bill/>, (accessed 7 September 2018).
- 14 R Griffin, The Traditional Courts Bill: are they getting it right?, Helen Suzman Foundation (HSF), Brief, 14 February 2017, <https://hsf.org.za/publications/hsf-briefs/the-traditional-courts-bill-are-they-getting-it-right/>, (accessed 7 September 2018).
- 15 T Memela, Traditional Courts Bill: Commission for Gender Equality submission; CGE submissions to Parliament, Parliamentary Monitoring Group (PMG), 20 March 2018, <https://pmg.org.za/committee-meeting/26031/>, (accessed 7 September 2018).
- 16 For a discussion of these issues see F Osman, Third time a charm? The Traditional Courts Bill 2017, *South African Crime Quarterly*, 2018, 64, 45–53.
- 17 TCB, clause 7(8).
- 18 Customary law is defined as a law that develops out of the social practices and customs of a particular group of people, which subsequently becomes legally obligatory to them. See L Meintjies-Van der Walt et al., *Introduction to South African law: fresh perspectives*, 2nd edition, Cape Town: Heinemann/Pearson Education South Africa, 2011, 111.
- 19 ES Nwauche, Affiliation to a new customary law in post-apartheid South Africa, *PER/PELJ*, 18:3, 2015, 569–592.
- 20 The TCB recognises that the applicable customary law to a given dispute shall have to be limited to the customs and traditions of a given people. This clause recognises the subjective nature of customary law to a given community. See YA Aiyedun, Fair trial and access to justice in South Africa: how traditional tribunals cater to the needs of rural female litigants, unpublished PhD thesis, University of Cape Town, 2013.
- 21 Constitution, section 35(5).
- 22 PJ Schwikkard and SE van der Merwe, *Principles of evidence*, 4th edition, Cape Town: Juta and Co Ltd, 2015, 230.
- 23 This objectivity is evaluated in detail in *ibid.*, para 129, 1210–1210(6).
- 24 Section 9 of the Constitution comes into play.
- 25 An example is the Supreme Court of Appeal's distaste for a traditional leader's exercise of his discretion in adjudicating cases in violations of his subject's rights, in *Buyelekhaya Dalindyabo v S* [2015] 4 All SA 689 (SCA). See discussion on *Buyelekhaya Dalindyabo v S*.
- 26 TCB, memorandum.
- 27 TCB, clause 3(2)a(1)-(2).

- 28 R Ozoemena, Living customary law: a truly transformative tool, *Constitutional Court Review*, 6, 2013, 147–164; AC Diala, The concept of living customary law: a critique, *The Journal of Legal Pluralism and Unofficial Law*, 49:2, 2017, 143–165.
- 29 TCB, clause 4(2)(b)(i).
- 30 While the TCB in clause 4(2)(b)(i) ousts the adjudication of cases investigated by the police, it does not offer options with regard to other investigative bodies.
- 31 See the discussion on vigilante evidence.
- 32 The High Court is empowered to review the decisions of the proposed traditional courts under clause 10(2)(b).
- 33 See F Hweshe, SA courts winning war against backlogs, *South African Government News Agency*, 7 June 2011, <https://www.sanews.gov.za/south-africa/sa-courts-winning-war-against-backlogs> (accessed 7 August 2018).
- 34 TCB, clause 7(3)(i)-(ii).
- 35 *Ibid.*, clause 7(3)(i)-(ii).
- 36 *Ibid.*, clause 7(4)(b).
- 37 See discussion on *Buyelekhaya Dalindyebo v S*.
- 38 Constitution, section 35(5).
- 39 The point of departure in the attempt by the legislature to embrace legal pluralism with regard to the application of customary law by the customary courts.
- 40 Compare this to the application of a trial within a trial in cases before the contemporary courts. See *S v Makhanya* 2002 (3) SA 201 (N), 201; *DPP Transvaal v Vijoer*, 2005 (1) SACR 505 (SCA), para 32, 187f-189g.
- 41 TCB, preamble, para 2.
- 42 *Buyelekhaya Dalindyebo v S* [2015] 4 All SA 689 (SCA).
- 43 *Ibid.*, para 77.
- 44 *Ibid.*, para 1.
- 45 TCB, clause 4(2)(b)(i).
- 46 *Ibid.*, schedule 2.
- 47 The empirical study by Tshehla, Here to stay, 15–20, reiterates various challenges in this regard.
- 48 Statistics on assaults, malicious damage to property.
- 49 See the facts in *Dalindyebo*.
- 50 See discussion on vigilante evidence.
- 51 *S v Tandwa* [2007] SCA 34 (RSA), para 116; *Mthembu v S* [2008] 3 All SA 159 (W), para 25. For more insights on section 35(5), see RD Nanima, The legal status of evidence obtained through human rights violations, unpublished LLM thesis, University of the Western Cape, 2016.
- 52 DT Zeffert and AP Paizes, *The South African law of evidence*, 2nd edition, Durban: LexisNexis, 2008, 724, 725, 728, 731, 736.
- 53 *Ibid.*, 724, 725, 728, 731, 736. Furthermore, South Africa also uses the common law exclusionary rule of evidence, which hinges on the discretion of the judiciary. There is, however, a distinction in the application of the common law exclusionary rule and the rule under section 35(5). It must be noted that the common law exclusionary rule applies to all cases, and not only criminal cases, while the statutory exclusionary rule applies only to criminal cases.
- 54 Constitution, sections 12, 14, 16, 21, 35.
- 55 *Ibid.*, section 35(1) (a), (h).
- 56 *Ibid.*, section 35(3) a, c, h.
- 57 *S v Songezo Mini and 4 others* unreported Case no. 141178 of 2015 (30 April 2015), para 20, 21, 22.
- 58 *S v Hena* 2006 2 SACR 33 (SE 40i-41b).
- 59 Empirical research from Limpopo shows that members and traditional leaders of a community join vigilante groups to fight crime in their communities. See B Tshehla, *Traditional justice in practice: a Limpopo case study*, Institute for Security Studies (ISS), Monograph 115, 2005, 45.
- 60 TCB, clause 7(8).
- 61 Unreported ECD case no. CA and R159 of 2001.
- 62 F Kayitare, Respect of the right to a fair trial in indigenous African criminal justice systems: the case of Rwanda and South Africa, unpublished LLM thesis, University of Ghana, 2004, on perceptions on the right to a fair trial in indigenous communities.

Is crime getting increasingly violent?

An assessment of the role of bank associated robbery in South Africa

Mahlongonolo Thobane and Johan Prinsloo*

kwadims@unisa.ac.za

prinsjh@unisa.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a4367>

There is public concern about the violent nature of crime in South Africa and the continuously increasing levels of crime, both of which place a huge burden on the resources of the criminal justice system. 'Bank associated robbery' is a bank-related robbery (or attempted robbery) of cash, committed against a bank client while en route to or from a bank or ATM. Although this phenomenon is relatively unknown both in the academe and to the general public, the drastic increase in these violent and potentially traumatic crimes puts the general public at risk, and is therefore of particular concern to the banking industry and criminal justice practitioners. The impact and consequences of these robberies are aggravated by their interaction with the so-called trio crimes: home invasions and robbery, business robberies, and vehicle hijacking. In this article the dynamics of bank associated robbery are analysed, as well as its interrelationship with the trio crimes.

When delivering his budget speech on 14 May 2017, the Minister of Justice and Correctional Services voiced his concern that South African society was becoming increasingly violent. The minister based his opinion on the fact that, over a period of 13 years, 'the number of offenders sentenced to 20 years and above increased a staggering 439%, while lifers grew 413%'.¹ Although sentencing trends do not directly reflect levels of violence in the country, these shifts coincide with a continuous increase in the

reported incidents of murder and aggravated robbery since 2014.²

Bank associated robbery – or 'associated robbery' – is a term coined by the banking industry as an operational concept. Bank associated robbery is

a bank-related robbery [by association] of cash or attempt thereto, committed against a bank client or his/her delegate, at any stage while en route to or from a bank branch, ATM or cash centre or inside the branch, to effect a deposit, or, withdrawal.³

In its simplest terms, therefore, bank associated robbery refers to a particular modus operandi

* Mahlongonolo Thobane is a senior lecturer in the Department of Criminology and Security Science, University of South Africa (UNISA). Johan Prinsloo is a research professor in the Department of Criminology and Security Science, UNISA.

where perpetrators target their victims because they know that they are carrying cash.

Minimal literature, whether popular or academic, is available on this topic, which can be attributed to the fact that the phenomenon is relatively unknown and under-researched, compared to more conventional bank-related crimes such as bank robbery and cash-in-transit (CIT) robbery. Apart from the lack of research, the unknown extent or so-called 'dark figure' of bank associated robberies poses a challenge for researchers who are trying to estimate the magnitude of the phenomenon. The statistics provided in this article are based on the 'known' figure⁴ of bank associated robberies, for the following reasons. First, the South African Police Service (SAPS) does not acknowledge bank associated robberies as such, but instead classifies robberies according to the location in which incidents take place. If a victim is followed home from the bank, and the crime takes place at his or her home, for example, the SAPS regards the incident as a home invasion and robbery, without necessarily linking it to the bank as an initial 'point of origin' of the crime. If the victim is followed to, and robbed at, his or her business premises, it will be categorised as a business robbery. If a victim is robbed in a public place, the incident may be deemed a street robbery or, if the victim is killed, a murder coincidental to a street robbery. Second, many victims do not report crime – even serious crimes. South Africa's 2016/17 Victims of Crime Survey revealed, for instance, that an estimated 13% of all hijackings and 43% of house robberies were not reported to the police.⁵

According to the South African Bank Risk Information Centre (SABRIC), organised criminal groups select 'spotters' to identify people who are making deposits or withdrawals of cash at a bank, after which the information is passed on to other members in the group who are in the immediate vicinity of the bank. The accomplices

will then follow victims and rob them at their workplace, home, or en route to their destination.⁶ It is very likely that these robbers will be armed and will resort to violence if they are confronted, or if the victim resists.⁷

Because of the traumatic and violent nature of the crime, bank associated robbery is of concern to the banking industry and indirectly to the public at large. According to Burger,⁸ the increasing levels of violent bank-related crimes can be attributed to a shift from crimes that present high personal risk, such as bank robbery, to crimes that present low(er) personal risk – such as bank associated robberies. In his opinion, this may explain the upsurge in the number of incidents and losses because of bank associated robberies.⁹

Notwithstanding the fact that we know little about the actual figures of this crime, it is clear from the available statistics that bank associated robberies and related cash losses have shown a drastic increase over the years. In the past 10 years, known incidents of bank associated robbery increased from 64 incidents reported in 2006 to 1 369 incidents in 2016.¹⁰ Incidents increased by 4% from 2015 to 2016, with 695 incidents being reported for the first six months of 2017. Cash losses experienced by victims during the first six months of 2017 amounted to R21 million.¹¹ Furthermore, from 2014 to June 2017, 27 fatalities and 69 injuries were recorded by SABRIC as a consequence of bank associated robberies, which underscores the aggravated nature and seriousness of these crimes.¹²

The aim of this study was to explore the phenomenon of bank associated robberies as a means to gain insight into this relatively unknown crime type. The larger study,¹³ from which this article is drawn, used a mixed method approach, and collected data in 2015 from three stakeholder groups, namely 11 subject matter experts (SMEs), seven primary

victims of associated robberies, and 500 adult members of the public who hold bank accounts with any South African bank. The information in the rest of this article is based on the answers obtained from the 11 SMEs, and is thematically presented below.

The 11 SMEs were purposively selected, and include investigators from the SAPS, operational managers from the banking industry and a prosecutor from the National Prosecuting Authority (NPA). These individuals were selected because they are knowledgeable on the subject of bank associated robberies. Data from this group was collected through the use of semi-structured, one-on-one, in-depth interviews, which were audio recorded (with their permission), transcribed and coded thematically.¹⁴

The study suffers from a limitation in that it relies heavily on a relatively small group of SMEs to provide insight and knowledge about the topic at hand. However, there is currently little scientific information available about bank associated robberies, and as experts on the topic, these individuals were able to provide rich and in-depth information. Despite this limitation, the study makes a contribution to the literature on a little-researched field.

The dynamics of bank associated robbery

SMEs reported that a gang of bank associated robbers is usually made up of two to six members, fulfilling the following roles:

Spotter

The role of the spotter is to observe and identify potential victims. In most cases, the spotter is not part of the robbery. In smaller operations, however, one person can take on the role of both a spotter and a gunman, although this is much riskier. The role of the spotter is crucial because the success of the robbery depends on the information that the spotter feeds to

the other group members, who are then responsible for executing the attack. Spotters are usually older, experienced perpetrators who started as gunmen but have transitioned into positions of authority within the violent crime underworld. As spotters grow older, they recruit younger persons who are physically stronger to execute the robbery, while they do the spotting.

Spotters may work in tandem, for example where there is more than one spotter in the same bank, or where there are different spotters from the same group located in different banks, in the same area and at the same time. Spotters work in this way to increase the chances of identifying a victim, since relying on a single spotter may mean missed opportunities in other banks while spotting in one bank, or while moving around between the banks. Spotters wear expensive clothing and use expensive electronic technology to create the impression that they are in the bank to conduct legitimate business, making them difficult for laymen to spot.

Gunman

The gunman uses the information provided by the spotter to execute the robbery. Gunmen are usually physically stronger, younger men. Depending on the size of the group, there may be two to three gunmen responsible for the execution of the robbery. As mentioned, some spotters – especially where a large amount of cash is involved – will act as both a spotter and a gunman. In one particular incident reported by the SMEs, three spotters were involved in the bank, with three gunmen waiting outside.

Driver

The driver is someone who has good driving skills and knowledge of motor mechanics. The role of the driver is mainly to ensure that the robbers get away from the crime scene

safely and thus s/he always sits in the car, ready to get away as soon as the robbery has been committed and the gunmen are back in the vehicle. Taxi drivers are, in some instances, recruited as drivers because of their perceived good driving skills and knowledge of the roads.

Resources required

Bank associated robbers require the following resources to commit a successful attack:

Vehicles

A gang of bank associated robbers usually needs a minimum of two vehicles, depending on the size of the gang. One vehicle is commonly 'legal' and the other(s) are hijacked or stolen vehicles. The spotters remain as clean as possible: their vehicle has legitimate registration papers, which reduces the risk that the spotter will be caught in possession of a stolen vehicle if s/he is stopped by police and linked to the rest of the group. The gunmen's vehicles are more frequently stolen or hijacked, although even these vehicles often carry registration discs and plates that are cloned to match a legitimately registered vehicle.

Firearms

Firearms are another essential resource for bank associated robbers. Each gunman requires a handgun, which means that the number of guns needed in the group fluctuates, depending on its size. These firearms are generally illegal and unlicensed, and, in some instances, rented from other criminals.

Corruption and the illegal trade in firearms also play a role in facilitating bank associated robberies. Thousands of firearms have been stolen from the SAPS and South African National Defence Force (SANDF) and 'have for years been, and are still being, used to commit crimes around the country.'¹⁵ For example, the media recently reported that 364 firearms that were stolen or lost by the SAPS were involved in

342 crimes such as murder, vehicle hijacking, armed robbery, housebreaking and theft.¹⁶

The Hawks are also investigating possible gun smuggling in the Western Cape, including the import and export of illegal guns.¹⁷

Cell phones

Perpetrators use cheap cell phones, which are discarded after two to three robberies.

They purchase Subscriber Identifying Module (SIM) cards that already comply with the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA), because the information used during the RICA process (i.e. identity number and residential address) belongs to someone else. It is consequently difficult to trace or intercept these phones.

Perpetrators use these cell phones to call one another, which means that there are no text messages that can be used as evidence or to link the group members to one another. In addition, offenders do not store one another's real contact details, but save them under pseudonyms.

Bank accounts

Perpetrators, especially spotters, need to hold legitimate bank accounts, particularly with the major banks in South Africa, since clients who bank at the 'big four' banks¹⁸ are the main targets, as these banks have a bigger client base and a larger footprint of both branches and ATMs. Interviewees reported that spotters must be legal account holders so that they have an authentic reason to be in the banking hall and may seem to be conducting legal business if seen roaming around in the bank. Spotters can therefore often be seen loitering around the banking hall, filling in deposit slips, depositing small amounts (e.g. R50), asking for change or plastic bags, or paying their DSTV accounts, for example, as a way of passing time while they are casing a potential victim.

Target selection

Where bank associated robberies are concerned, Maree explains that there are different categories of victims, namely individuals, small businesses and *stokvels* (saving clubs). Small businesses and *stokvels* are easy targets, because they do their own banking and usually follow a routine, for instance doing banking at the same time and day of the week, and always at the same bank. This routine activity makes observation and information gathering easy for criminals.¹⁹

Clients increase their chance of being robbed by having a lot of money on their person. Although some victims are identified beforehand (i.e. business owners who are targeted owing to their routine), ‘targets’ (victims) are mostly selected randomly – for example, those utilising bulk tellers²⁰ to withdraw money. If a client is seen by the spotter going into the bulk teller area, his/her chance of being victimised increases. Perpetrators alternate between the four major banks, casing each bank for potential victims and depending on luck to find a target in at least one of the banks. If a victim is not found in one of the banks, these robbers then move to the next bank, hoping for an opportunity to present itself.

Victims’ demeanour inside the bank may also draw attention to them. As one of the SMEs pointed out:

Victims cannot keep quiet, they often complain in queues and anyone can hear them. They blurt out how much they want at the tellers, and sometimes while standing in the queue as well. Victims choose themselves to be robbed because of their behaviour.²¹

Perpetrators prefer banks situated in malls or shopping centres with parking bays in front of the bank or that are easily accessible, or where different banks are clustered around the same

area, providing easy access for spotters. There is also a lot of movement in shopping malls, which means that it is not easy for victims to notice when they are being followed.

Selecting targets in shopping centres or malls with only a few shops and with parking bays not too far from the bank(s) means that the perpetrators can be relatively sure that the client is unlikely to be delayed in the mall doing shopping after withdrawing money from the bank. Instead, bank clients are more likely to go straight to their vehicles after completing their business in the bank. In such locations, where the parking bay is not too far from the bank(s), following the client is easier and quicker. Geographical pattern analysis undertaken by SABRIC confirms that shopping centres or malls closest to highways and main roads are also preferred for an easy and quick getaway.

Post-offence behaviour

The group dynamics of a bank associated robbery gang emerge from some type of rank hierarchy or similar structure. The ‘mastermind’ who plans the crime receives the biggest portion of the cash. The driver usually gets the smallest cut because his/her role is just to wait in the car and drive away from the scene, while others, like the gunmen, execute the attack.

The principle of ‘honour among thieves’ appears to have little place in these gangs. Lying and deception in the ranks is common, and some members end up getting a larger share of the money than others through ‘misappropriation’ of some of the spoils before the actual distribution takes place. Because the spotter does not use the same vehicle as the gunmen and the driver, s/he is at much higher risk of being cheated in this way. As such, spotters will, in some groups, play two roles – for example, identifying potential targets and then also joining the group that executes the robbery so as to ensure that they are not lied to about the money taken from the victim.

Gabor et al. posit that understanding how robbers spend the cash that they get from robberies will help identify precipitating factors with regard to specific crimes.²² Zinn found that armed robbers mostly squander their money on an extravagant lifestyle, including prostitutes, gambling, expensive cars, designer clothes and shoes, while a small number of the cash-in-transit respondents invest the stolen money in real estate.²³ In her research on the criminal careers of armed robbers, Thobane reports that, depending on their stage of life, robbers spend the loot in different ways.²⁴ Young individuals mostly use their share to finance lavish lifestyles and recreational substance abuse, while more mature persons use the money for their daily expenses, savings and to pay off debts they may have accumulated.

Experts interviewed for this study confirmed this finding, adding that older individuals will generally use their money to take care of their families, invest in businesses such as taxis, tuck shops or taverns, buy expensive furniture and electronic appliances, or renovate their houses, whereas younger perpetrators will spend their spoils on partying and expensive clothes.

The consequences of bank associated robbery

The first impact of bank associated robberies on victims is the obvious loss of cash. The average sum of cash lost ranges from between R30 000 to R160 000 per incident. In one rare case, SMEs (who belong to a task team that meets weekly) reported that an amount of approximately R3 000 000 had been lost.

Furthermore, victims may also suffer serious injury or even loss of life, especially where perpetrators use force or violence, thus incurring further expenses. Victims are also vulnerable to other types of victimisation, such as rape, house

robbery where victims were followed home, theft, and restrictions of movement.

Trio crimes and the link to bank associated robbery

Another important dimension of bank associated robbery is its interaction with other serious violent crimes, specifically the so-called trio crimes. These comprise home invasions (house robberies), business robberies and vehicle hijackings as subcategories of aggravated robbery, and may also be accompanied by murder. The heightened concern about the trio crimes is a result of the substantial increases in incidents of these respective manifestations of aggravated robbery that have been evident since 2006.²⁵

Recent crime statistics, released by the SAPS for the period 1 April 2016 to 31 March 2017, once again reflected an upsurge in violent crime; especially the trio crimes associated with bank associated robberies.²⁶ Aggravated robberies appear to have peaked during this period: Kriegler demonstrates an increase of almost 30% over the five-year period up to December 2016,²⁷ and Newham reports that these robberies are at their highest level since 2003, totalling 140 956 recorded incidents in 2016/17 (an increase of 6.4% over the previous year alone).²⁸

Hijacking shows a similar trend. Incidents of motor vehicle hijacking have increased by about 13% over the same five-year period to 2016,²⁹ while in 2016/17 the police recorded the highest number of carjackings in the past 10 years (16 717 reported incidents, representing an increase of 14.5% from 2015/16).³⁰ On average, then, 45.8 cars were hijacked per day in 2016/17 – the majority of them in Gauteng.³¹

Home invasions doubled during the period between 2003 and 2016, and the house robbery rate also increased marginally (from 20 820 to 22 343 incidents) from 2015/16

to 2016/17.³² Coupled with these increases, Kriegler also argues that crime in South Africa is increasingly likely to be characterised by physical and violent encounters with offenders.³³

Taken together, trio crimes instil fear in members of the public owing to the perceived threat of their lingering omnipresence, and the sense of invasion of one's perceived sanctuary of privacy and security at home, at work, or while travelling in a motor vehicle. Newham explains: 'These crimes can happen to anyone and are highly traumatic to victims, as they are too often accompanied by murder, rape and serious assault, or the threat of these crimes.'³⁴ Zinn argues that a crime such as motor vehicle hijacking inhibits people's freedom of movement, and in turn constrains their economic growth. Vehicle hijackings have substantial negative effects on South Africa, particularly in terms of the loss of property and psycho-social harm as a result of the trauma and fear experienced by victims and society at large.³⁵ Home invasions cause significant trauma because homeowners' 'privacy, control and security' are taken away from them. Many victims are accosted and exposed to violence:³⁶

[I]n some robberies householders are tortured, beaten, physically intimidated and verbally abused. On a daily basis South African media carry reports and graphic descriptions of violent crime, including house robberies. The unpredictability and prevalence of criminal attacks at homes make for extreme levels of insecurity.

Perpetrators of trio crimes are relatively organised, and plan their attacks well. Zinn shows, for example, that offenders prefer vehicle hijackings to motor vehicle theft because it is a lucrative crime from which they are able to make quick cash without having to deal with practical considerations like 'alarms, immobilisers, [and] opening the car door' as well as starting the engine without the key.

Offenders believe that stealing a vehicle, as opposed to hijacking it, increases one's chances of being apprehended.³⁷

Armed robberies are frequently perpetrated by criminal syndicates as part of organised crime.³⁸ A single robbery will generally yield a high value in stolen goods and cash.³⁹ In addition to the economic incentives for committing these types of aggravated robberies, there is little disincentive for perpetrators, as they are seldom arrested and successfully prosecuted. Newham argues that the combination of strategies they employ, including proper planning, the use of elements of surprise and force, successful escapes and eluding of law enforcement means that 'criminally orientated individuals and groups increasingly [recognise] that robbery [is] a low risk and high yield enterprise'.⁴⁰

In the experience of SMEs who were interviewed for this research, many perpetrators are repeat offenders who started with petty crimes and then graduated to bank associated robbery. These interviewees report that bank associated robbers are also involved in aggravated robbery, vehicle hijacking and murder. Theft and the hijacking of cars are also considered essential parts of bank associated robbery, because offenders need vehicles to commit these crimes. Consequently, offenders will either hijack cars themselves or will link up with someone who 'specialises' in vehicle hijackings to supply them with vehicles. In the experience of the SMEs, offenders will not hesitate to shoot if confronted.

According to the SMEs, some of the offenders may also commit hijacking and robbery of trucks delivering British American Tobacco (BAT) products to *spaza* shops⁴¹ in the townships (colloquially known among the SMEs as 'BAT robbery'). One SME is also of the opinion that there is a strong link between robberies where people are followed from airports and bank associated robberies, because of a similar

modus operandi. One bank associated robber has indeed also been convicted for an airport-following robbery, as confirmed by the SME.

The characteristics of bank associated robbers are similar to those identified by Zinn and Newham in that they exhibit elements of planning the crime; are drawn by easy and quick cash; operate in groups where there is a division of roles; and will frequently squander the money on maintaining a lavish lifestyle. SMEs argue that offenders engage in bank associated robbery because the crime presents a low personal safety risk and results in 'scoring' a large amount of money in a short period of time. 'Masterminds', who are older and more experienced, and usually have previous convictions for crimes such as robbery with aggravating circumstances or business robberies, will recruit younger offenders.

Bank associated robbers meet in the morning at taverns or petrol stations to discuss get-away routes, distribute resources such as weapons and cellphones, and assign roles to each of the members in the team. Bank associated robbers may not be targeting big 'scores' such as banks, for example, but will target individuals who have large amounts of money in their possession.

In the process of committing bank associated robberies, offenders are presented with opportunities to commit other crimes. As mentioned, SMEs report, for example, that offenders will shoot if victims show resistance during the commission of a hijacking. They may therefore also be guilty of committing murder. SMEs believe strongly that success in the prevention of bank associated robberies will have a positive impact on the prevention of other crimes, particularly the trio crimes, as it often constitutes the initial phases of other such crimes.

Burger argues that the trio crimes raise 'the biggest concern' or crime threat of the six

crime sub-categories clustered under the aggravating robbery category.⁴² Newham holds that it is essential to increase crime intelligence and analysis capacity in respect of trio crimes if we hope to identify and detect the perpetrators and their networks.⁴³ Extending this strategy to include bank associated robbery would contribute to the combatting of the trio crimes, inclusive of bank associated robberies.

Conclusion

It is evident from the data presented above that structured, organised gangs are responsible for bank associated robberies, and that they apply their own strategies and tactics with varied success, thereby creating a category of crime specialists. Serial offenders or the same individuals committing repeated crimes are responsible for a large number of these crimes. Even though bank associated robbery is seen as a highly specialised crime characterised by agile motives, criminals are also versatile in their offending. Statistics show high levels of incidents of house invasions and vehicle hijacking, and this study confirms that bank associated robberies contribute to the incidence of those aggravated robberies.

In response to the surge in bank associated robberies, the SAPS has formed a task team to deal specifically with these crimes. In addition to these efforts, it would be useful to extend intelligence networks devoted to the investigation of the trio crimes to include bank associated robbery, especially since other trio crimes are frequently consequential outcomes of bank associated robberies. Improving the conviction rates of those who commit bank associated robberies may also be used to deter potential perpetrators from committing these crimes.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

Notes

- 1 K Magubane, More long jail terms point to rise in violence, *BusinessDay*, 17 May 2017, <https://www.businesslive.co.za/bd/national/2017-05-17-dramatic-increase-in-long-prison-sentences-troubles-michael-masutha/> (accessed 17 November 2017).
- 2 South African Police Service (SAPS), *Back to basics: towards a safer tomorrow. Crime situation in South Africa 1 April 2016 – 31 March 2017*, 24 October 2017, https://www.saps.gov.za/services/final_crime_stats_presentation_24_october_2017.pdf (accessed 18 May 2018).
- 3 South African Banking Risk Information Centre (SABRIC), Don't fall victim to cash robberies, 25 July 2017, <https://www.sabric.co.za/media-and-news/posts/don-t-fall-victim-to-cash-robberies/> (accessed 8 October 2017).
- 4 The 'known' figure here refers to those incidents that are known to the police and investigated. Many aggravated robberies are not reported.
- 5 Africa Check, Factsheet: South Africa's crime statistics for 2016/17, 3 November 2017, <https://africacheck.org/factsheets/south-africas-crime-statistics-201617/> (accessed 18 May 2018).
- 6 A Kempen, Associate robberies: don't become the next victim, *Servamus*, September 2014, 40–41.
- 7 SABRIC, Don't fall victim to cash robberies.
- 8 Personal communication, Johan Burger, 31 October 2016.
- 9 Ibid.
- 10 SABRIC, Don't fall victim to cash robberies.
- 11 MS Thobane, A criminological exploration of bank associated robberies in Gauteng, South Africa, unpublished DLitt et Phil thesis, University of South Africa, 2017, 5–8.
- 12 SABRIC, Don't fall victim to cash robberies.
- 13 The present article originates from Thobane, A criminological exploration of bank associated robberies in Gauteng, South Africa, 5–8.
- 14 Ibid., 5–8.
- 15 C Dolley, Police guns 'used to fuel taxi and political killings and gang wars', *News24*, 2 November 2017, <http://www.politicsweb.co.za/news-and-analysis/police-guns-used-to-fuel-taxi-and-political-killing> (accessed 17 November 2017).
- 16 K Lorimer, 364 stolen and lost SAPS firearms involved in 342 crimes, *PoliticsWeb*, 9 November 2017, http://www.politicsweb.co.za/politics/364-stolen-and-lost-saps-firearms-involved-in-342-?utm_source=Politicsweb+Daily+Headlines&utm_campaign=5b029b5b46-MAIL_CAMPAIGN_2017_11_09&utm_medium=email&utm_term=0_a86f25db99-5b029b5b46-140168125 (accessed 10 November 2017).
- 17 Dolley, Police guns 'used to fuel taxi and political killings and gang wars'.
- 18 ABSA, First National Bank, Nedbank and Standard Bank.
- 19 Personal communication, Dr Alice Maree, Senior Manager, SABRIC, 7 May 2015.
- 20 A bulk teller is a bank employee who provides a service to customers (e.g. small and medium-sized enterprises) that make deposits or withdrawals of large amounts of cash.
- 21 Personal communication, subject matter expert, 31 March 2016.
- 22 T Gabor et al., *Armed robbery: cops, robbers and victims*, Springfield: Charles C Thomas, 1987, 65.
- 23 R Zinn, The policing of robbery with aggravating circumstances: case studies of incarcerated offenders of home invasions, carjackings and cash-in-transit heists in South Africa, *Acta Criminologica*, 30:2, 2017, 14.
- 24 MS Thobane, The criminal career of armed robbers with specific reference to cash-in-transit robberies, unpublished MA dissertation, University of South Africa, 2017, 159–161, 205.
- 25 G Newham, Cops and robbers – a new approach: the Gauteng Aggravated Robbery Strategy, *South African Crime Quarterly*, 29:1, 2009, 3–8.
- 26 *BusinessTech*, South Africa's latest crime stats: everything you need to know, 3 March 2017, <https://businesstech.co.za/news/government/161715/south-africas-latest-crime-stats-everything-you-need-to-know/> (accessed 17 November 2017).
- 27 A Kriegler, South African crime stats show police struggling to close cases, *The Conversation*, 31 October 2017, <https://theconversation.com/south-african-crime-stats-show-police-struggling-to-close-cases-86429> (accessed 1 November 2017).
- 28 G Hosken, Here's why home robberies and hijackings are soaring, *Times Live*, 24 October 2017, <https://www.timeslive.co.za/news/south-africa/2017-10-24-heres-why-home-robberies-and-hijackings-are-soaring/> (accessed 13 September 2018).
- 29 Kriegler, South African crime stats show police struggling to close cases.
- 30 SAPS, *Back to basics*, 36.
- 31 Africa Check, Factsheet.
- 32 SAPS, *Back to basics*, 50.
- 33 Kriegler, South African crime stats show police struggling to close cases.
- 34 Newham, Cops and robbers, 4.
- 35 R Zinn, Sentenced motor vehicle hijackers imprisoned in Gauteng as a source of crime intelligence, unpublished MTech dissertation, University of South Africa, 2002, 15.
- 36 R Zinn, *Home invasion: robbers disclose what you should know*, Cape Town: Tafelberg, 2010, 2.
- 37 Zinn, Sentenced motor vehicle hijackers imprisoned in Gauteng as a source of crime intelligence, 171.
- 38 Hosken, Here's why home robberies and hijackings are soaring.
- 39 Newham, Cops and robbers, 4.
- 40 Ibid., 5.
- 41 A *spaza* shop is an informal convenience store mostly run from a yard/house. *Spaza* shops supplement owners' household income through the selling of day-to-day household needs (e.g. bread, milk, soap, detergent, etc.).
- 42 Personal communication, Johan Burger, 31 October 2016.
- 43 Newham, Cops and robbers, 5.

In no certain terms

The court's inconsistent approach to the role of sexual grooming when sentencing in cases of the sexual abuse of children under 16

Nicole van Zyl*

Nicole.vz42@gmail.com

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a4473>

This article considers whether evidence of sexual grooming influences decisions by South African courts when passing sentence on offenders who have been found guilty of sexual assault or rape of children. By analysing judicial decisions, the article considers three themes – the lack of violence, the apparent consent of a child under 12, and the appropriateness of correctional supervision. The article concludes that evidence of grooming should play a role in sentencing decisions, as it forms part of the nature of the crime that the court is required to consider.

The concept of sexual grooming is new in South African law, with a fledgling jurisprudence and an even younger statutory provision. This article examines six cases in which a child under the age of 16 was raped¹ or sexually assaulted² by an adult, and where there was evidence of sexual grooming that facilitated the completion of the offence. The article examines whether the presence of sexual grooming is considered by the court when passing sentence, and if so, in what way it influences the decision. From the analysis of case law, it is argued that in order to arrive at an appropriate sentence, the court must consider the broad factual circumstances – which include the grooming process – when

discussing the nature of the crime and the interests of society, balanced against the interests of the offender.

This analysis is independent of the stand-alone offence of sexual grooming in section 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA) of 2007. Section 18 criminalises specific conduct that may form a part of the grooming process and can be considered unlawful, even if it never culminates in a sexual offence against the child. The cases examined in this article may include some of the conduct criminalised by section 18, but also encompass the broader understanding of grooming adopted in case law. The concept of sexual grooming is an important one when considering whether the court should accept the apparent consent of a child. There is an innate power imbalance between an adult and a child that should demand heightened

* Nicole van Zyl is a Sonke Gender Justice Fellow at the University of California, Los Angeles, in the David J Epstein Public Interest Litigation and Policy LLM programme. She completed her LLB at the University of Cape Town in 2016, and an LLM in Criminology, Law and Society at the same institution in 2017.

scrutiny. At its core, evidence of grooming has the ability to negate a defence of consent when establishing criminal liability.³ In addition, it continues to play a role at the sentencing stage owing to the many considerations at play when deciding on an appropriate sentence. This article draws on a broader definition of grooming than the one included in the legislation, to reflect some of the psychological features discussed in the case law.

The article briefly describes grooming and its different roles in the law, and then proceeds to describe the general law on sentencing in which evidence of grooming may play a role. This role is then examined in various judicial decisions, in an analysis that considers three specific themes. First, it canvasses decisions that have highlighted the lack of violence in an offence, and then it considers two cases that were appealed as a result of judicial reliance on consent of a child under 12 when deciding on sentence. It considers two cases where the courts looked into whether correctional supervision would be an appropriate sentence, and the role that evidence of grooming played in the outcome. This article concludes that evidence of grooming is an important consideration in the sentencing process for persons convicted of rape or sexual assault of children, based on the outcomes of the cases examined.

Sexual grooming

Sexual grooming is understood in the literature as a process where an adult subjects a child to psychological manipulation and violation of their developing sexuality.⁴ A perpetrator will make use of their adult authority or economic resources to draw a child into a relationship that is for the benefit of the perpetrator's sexual desires.⁵ The child may adopt responsibility for the violation they suffer because they feel complicit, because they fear their abuser, or because they have become emotionally

dependent on the abuser.⁶ The process of grooming is one that does not require the use of force precisely because of the child's complicity or fear.⁷ This broad understanding of sexual grooming in the law is discussed in the minority decision of *S v Marx* (2005)⁸ and the decision in *S v Muller*.⁹

Grooming has been recognised as a gateway to sexual abuse, and, as a result, the legislature saw fit to include it as a stand-alone crime in section 18 of SORMA.¹⁰ Classification of this new offence aims to protect children from incidents of sexual abuse, as the abuser may be prosecuted under this section even before a sexual violation has occurred. Section 18 also defines specific conduct that falls under the definition of grooming, such as showing pornography to a child in order to encourage or instruct that child to perform a sexual act,¹¹ or arranging to meet a child with the intention that the meeting will result in a sexual act.¹²

The approach of the courts has been much more broad and flexible in establishing the presence of sexual grooming than the definition contained in the legislation. *S v Muller* defined grooming as 'a psychological process used by the paedophile to access his victim'.¹³ This broad definition allows the court to take into account all of the offender's conduct surrounding the sexual abuse. It is able to do so because punishment is not being imposed for a separate offence of grooming, but, instead, evidence of grooming supports the prosecutor's case of alleged rape or sexual assault. In practice, then, a set of facts may satisfy the elements of the crime of grooming under section 18 of the Act, as well as supporting a broader understanding of grooming based on the psychological features of the process, and how this process created the context in which the sexual offence could occur.

Sentencing in grooming cases

The cases considered in this article all deal with a successful conviction of an accused for rape

or sexual assault of a complainant who is younger than 16. The article does not focus on the role that grooming played in securing the convictions, but rather on how it affected the sentencing of the offender. Such a discussion warrants some background on the sentencing framework, before turning to the discussion on grooming in these cases.

At the heart of any sentencing decision is an application of the *Zinn* triad, as set into law by the decision of *S v Zinn* where Justice of Appeal Rumpff held that 'what has to be considered is the triad consisting of the crime, the offender and the interests of society'.¹⁴ As will be shown later in this article, evidence of grooming is taken into account when establishing the nature of the crime, which in turn affects sentencing. For example, whether an offence is deemed to be sexual assault or rape has important implications at sentence. When sentencing an offender convicted of sexual assault (section 5 of SORMA), the court needs only to consider the common law on sentence. Grooming that leads to rape (under section 3 of SORMA) will, however, trigger the imposition of a mandatory minimum sentence under section 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA), read with the Criminal Law (Sentencing) Amendment Act 38 of 2007. As a result, sentencing an offender who is convicted of rape is more complex.

Rape of a child under 16 years old falls under part 1 of schedule 2 of the CLAA. The court must sentence a person convicted of such a crime to a life sentence. The court's discretion to deviate from the statutory minimum sentence is limited to cases where 'substantial and compelling circumstances' exist that justify the imposition of a lesser sentence.¹⁵ In addition, section 51(aA) prohibits the court from considering 'the apparent lack of physical injury to the complainant' as a substantial and compelling circumstance that justifies such a

deviation.¹⁶ This becomes relevant, as the cases examined lacked any physical injury considered to be significant or lasting. However, in practice the apparent lack of injury still formed part of the list of factors that the court considered in mitigation of sentence in some decisions.

The application of the CLAA is guided by the decision in *S v Malgas*, which intended to provide clarity on when a court could deviate from the prescribed minimum sentence.¹⁷ Justice of Appeal Marais's judgment requires that the prescribed minimum sentence ordinarily be imposed, but that if the case calls for a departure from the sentence, the court should do so guided by notions of justice and proportionality.¹⁸ Marais notes that 'the greater sense of unease a court feels about the imposition of a sentence, the greater its anxiety will be that it may be perpetrating an injustice'.¹⁹

In practice, addressing this 'unease' varies from case to case, as courts attempt to deal with questions of (dis)proportionality in sentencing. It does mean, however, that the judicial officer retains substantial discretion in the imposition of sentence.²⁰

Adding an additional charge of sexual grooming cannot increase the amount of time an offender spends in prison. However, evidence of sexual grooming (as a separate offence or merely as part of the fact pattern of the sexual offence) can still impact severity of sentence when considering the *Zinn* triad. *S v Steyn* illustrates the impact on sentence when an offender has committed an offence under section 18 of SORMA, in addition to having committed a sexual offence.²¹ *Steyn* deals with the persistent sexual abuse of the offender's stepson. The accused would masturbate his stepson, or himself in front of his stepson, in order to encourage him to do the same. This conduct, which spanned two years, resulted in a charge of sexual assault. The accused began his abuse after his stepson came to him to discuss his sexual education in school. The accused used this natural adolescent enquiry to discuss

masturbation, with the result that he was also charged with sexual grooming. The judge described the offender's conduct as using 'the guise of a parental interest in SR's development to encourage SR into sexual acts with him at a time when he was young and impressionable, and dependent on [him]'.²²

This case highlights an important principle in sentencing, which holds that where there are multiple offences, the offender's sentences should run concurrently if the 'evidence shows that the relevant offences are "inextricably linked in terms of locality, time, protagonists and, importantly, the fact that they were committed with one common intent"'.²³ Under this principle, offenders such as Steyn, who commit sexual assault or rape through a process of grooming, and are also charged with the separate section 18 offence, must have sentences that run concurrently. The judge in *Steyn* held that 'the appellant's sexual grooming of SR was committed with an intent to ... reduce SR's unwillingness to the appellant committing acts of sexual assault against SR'.²⁴ The sentences for the various convictions were therefore ordered to run concurrently.

Case analysis

This article considers how judges have considered features of the grooming process when passing sentence on an offender. As noted above, in cases where the grooming results in rape, the court must make its decision in keeping with legislation imposing a mandatory minimum sentence. Even in cases of sexual assault that do not trigger a mandatory minimum sentence, the court's reasoning often follows similar considerations as set out in the sentencing framework. A court may therefore take features of the grooming process into account when deciding to either reduce or impose a harsher sentence.

The consequences of grooming in facilitating abuse vary from case to case, and there is, as

a result, no clear guidance on how grooming should be considered when sentencing an offender. This discussion analyses the cases of offences facilitated through grooming along three themes. The first theme considers decisions that rely on a lack of violence in mitigating sentence. The second theme discusses two cases where the court relies on the apparent consent of a child under the age of 12 to justify reducing the sentence for a rape conviction. The third theme examines cases where correctional supervision was deemed appropriate for an offender in a grooming-related case. All three themes show the variability of sentence outcomes, which highlights the need for proper recognition of how grooming forms an integral part of the sexual offence that is committed. By failing to make this link, prosecutors and judges make decisions that perpetuate harmful perceptions about children and sexual abuse.

Lack of violence

S v Muller concerned the rape of a 14-year-old girl (on two occasions) by her stepfather. The accused was found guilty on two counts of rape. The age of the complainant, and the fact that the offence had occurred more than once, triggered the application of the minimum sentence of life imprisonment as prescribed by section 51(1),²⁵ which Justice Satchwell ultimately imposed on the accused.²⁶ The judge was asked to consider whether a number of factors met the standard for 'substantial and compelling circumstances' that warranted a deviation from the mandatory minimum sentence. As part of these arguments, the defence raised the lack of violence and absence of bodily injury that characterised the rape. Satchwell held that

it is difficult to comprehend how this could be relevant or mitigating in circumstances where no violence or threat of violence was needed by the rapist to achieve his deeds.²⁷

This judgment succeeded in excluding a core feature of the grooming process – the fact that an offender does not have to resort to the use of force because of the child’s complicity or fear – from constituting a substantial and compelling circumstance to deviate from a sentence of life imprisonment.

The decision in *S v AS*²⁸ follows a different approach to that taken in *Muller*. The offender indecently assaulted his goddaughter, and he was prosecuted under the common law because, at the time of the incident, SORMA was not yet in place. Because of the restrictive common law definition of rape, and the fact that his case involved oral penetration of the complainant with his penis, the offender was charged with indecent assault. (Had the incident occurred after the commencement of the new law, the accused would have been guilty of rape.) Evaluating the accused’s conduct, Justice Lekale writes that ‘the abuse would have, most probably, culminated in rape in the common law sense as the child gradually got accustomed to it and the number and value of gifts increased’.²⁹ This judgment shows an appreciation of the ways in which the grooming process operates. However, the judge later also includes ‘the fact that the complainant in this matter did not sustain any physical injuries’³⁰ as a justification for reducing the court *a quo*’s sentence.

These two cases show how the same core feature of the grooming process can be used in contradictory ways by different judicial officers. Grooming as a psychological process secures the compliance of the child involved, which means that violence is not necessary for the offender to achieve their ends. *Muller* found that the lack of violence was insufficient grounds to deviate from the prescribed minimum, while in the case of *AS* it was considered a mitigating factor in favour of the offender.

The law now prohibits lack of violence from constituting a substantial or compelling

circumstance under section 51(3) (aA) of the CLAA. This means that judges cannot rely on a lack of violence in mitigation of sentence. This is especially relevant in the context of grooming, where the nature of the crime necessarily excludes violence. A consideration of the contextual factors that lead to the offence, with due appreciation of the mechanisms through which the grooming process occurs, can help prevent such a decision.

Consent of a child under 12

Two matters travelled to the appeal court because of a specific factual consideration used by the judge in deciding on an appropriate sentence. In both cases, the court was faced with a complainant under the age of 12, who is, by definition, unable to consent to sex under section 57(1) of the SORMA.³¹ In both cases, however, the judge used the apparent consent or compliant behaviour of the child as a substantial and compelling factor that justified the imposition of a lesser sentence. Both cases occurred in the same court’s jurisdiction, and the Director of Public Prosecutions, Gauteng appealed both sentences as incorrect in law.

The first matter, *MJM v S*,³² concerned a case where the accused had what was described as an ongoing sexual relationship with an 11-year-old girl, to which she seemingly acquiesced. Justice of Appeal Mushasha notes that ‘counsel [for the state] argued strongly on the doctrine of grooming’,³³ which the court accepted, but did not explore. When considering arguments against the imposition of a life sentence the judge writes that ‘it seems to me that the only aggravating factor in this case is the age of the complainant’.³⁴ The list of mitigating factors he relies on to reduce the sentence includes the ‘cooperation of the complainant’³⁵ in giving the accused access to her home, and that

the complainant proceeded of her own accord to appellant’s home ... It is remarkable that complainant’s visit took

place despite the fact that she was already previously raped by the appellant.³⁶

The process of grooming will often result in a compliant victim, because the child is emotionally manipulated to participate through guilt or loyalty. This compliance from a child is what makes ongoing sexual abuse by an adult possible. By including them as mitigating factors in this matter, the judge used core features of the grooming process as a reason to deviate from the statutory minimum sentence of life in prison to 20 years' imprisonment.

The decision in *MJM* was appealed in *Director Public Prosecutions, Gauteng v Mphaphama*.³⁷ The state sought to appeal the sentence under section 16(1)(b), read with section 17(3) of the Superior Courts Act 10 of 2013, on the grounds that the High Court had erred in law when including the consent of the complainant as a consideration in imposing sentence. The state based its argument on the fact that section 57(1) of SORMA establishes that a child under the age of 12 is unable to consent. Although the court ruled that it did not have the necessary jurisdiction³⁸ to hear the appeal, Justice of Appeal Willis made sure to comment that 'while the approach of the High Court in this matter is to be strongly deprecated, our hands are tied'.³⁹ Although the outcome was not successful, this decision has the positive effect of censuring the approach taken in Mushasha's original decision in case law.

The Gauteng Director of Public Prosecutions was offered another opportunity to challenge the use of the compliance of a child under the age of 12 as a substantial and compelling circumstance in *S v MG*.⁴⁰ This case concerned an appeal of conviction and sentence of multiple charges against the accused, who was the stepfather of the 11-year-old complainant, and who was accused of raping her, as well as producing pornographic images of her. The appeal was based on issues of evidence

collection and presentation before the court. The judge found that the accused had inserted his penis into the mouth of the complainant, and photographed the incident.⁴¹

The accused was found guilty of rape, and when considering the appropriate sentence, Justice Preller noted that 'there is a strong suspicion that the victim was not an unwilling participant in the events'.⁴² This impression was based partly on the complainant's oral testimony: she did not express disgust or hurt at the actions of the appellant, and although a threat was used to ensure her compliance⁴³ this did not take place before every incident. These findings, coupled with the expression on her face in the photographs where she has the appellant's penis in her mouth, were relied on to suggest that she was not unwilling or forced. Preller concludes on the complainant's evidence as to the nature of the crime:

I am fully aware that she was at the time only 10 years old and that the absence or otherwise of consent is irrelevant as an element of the commission of the offence. It must, however, be an important factor in considering an appropriate sentence.

This consideration, along with the offender's youthfulness and his experience of abuse as a child, led the court to justify a deviation and impose a 10-year sentence for rape. The case was taken on appeal,⁴⁴ where the Supreme Court of Appeal (SCA) held (per Justice of Appeal Petse) that the court did have the power to overturn the sentence imposed,⁴⁵ due to the incorrect legal basis of the High Court decision:

In this case the High Court imputed consent to the complainant. It did so despite the clear and unequivocal provisions of s 57(1) of the Sexual Offences Act ... In doing so, the High Court committed an error of law.⁴⁶

This allowed the SCA to refer the matter back to the High Court to be sentenced afresh. In doing so the court noted that

the respondent gratuitously violated that complainant's right to dignity, privacy and physical integrity in a most humiliating and demeaning manner. Accordingly, on the facts of this case one must ... keep uppermost in the mind, with a measure of abhorrence, the respondent's unfatherly conduct in sexually molesting his stepdaughter.⁴⁷

Following this SCA decision, the High Court takes a very different approach to sentencing in *Grobler v S*.⁴⁸ Justice Fisher's judgment is more victim-centred and focuses on the experience of the complainant, although there was not much evidence of her actual experience before the court. Fisher writes:

[W]hilst she should have been nurtured and guided at this crucial stage of her young life, she was predated upon by the appellant who was opportunistic, in taking advantages of the absences of her mother from the home.⁴⁹

The lack of evidence as to the impact on the victim (owing to a failure to admit the victim impact statement to the court) sets a useful standard for sentencing:

[E]ven if it were assumed that the complainant would have been found in such a report to have experienced little or no trauma as a result of the offences, this would not serve to ameliorate their seriousness for the purposes of the enquiry as to whether substantial and compelling circumstances exist to depart from the prescribed sentence.⁵⁰

Fisher does not find any reasons to justify a departure from the mandatory minimum sentence as a result of a more detailed

consideration of the nature of the offence and the victim's interests.⁵¹

The original High Court decisions in these two cases show how an outcome of the grooming process – the apparent consent or compliance of a child – was relied on in mitigation of sentence. The SCA decision in *MG* should put an end to this reasoning in cases involving victims under the age of 12, as it clearly sets out that any reliance on the consent of a child under the age of 12 in mitigation of sentence is an error in law because of their statutory inability to give consent. Evidence of grooming remains relevant to a decision of sentence, as it speaks to the nature of the offence, as demonstrated by the decision in *Grobler*, where the court draws on the complex features of grooming within the home in establishing the serious nature of the crime.

Correctional supervision and grooming

*Enslin v State*⁵² and *S v AR*⁵³ provide interesting counterpoints on the question of whether correctional supervision is an appropriate sentence in cases where a rape or sexual assault is facilitated through grooming.

In *Enslin*, the offender had been convicted in the regional court of rape of his 17-year-old stepdaughter, as well as of various acts of sexual assault, which began when she was 14. He was also convicted of sexual grooming. The regional court imposed a sentence of eight years for the rape, which the offender appealed before the High Court. Although the various convictions suggest that the complainant was groomed over a number of years during her adolescence, the judge accepted without much comment the argument in mitigation that

the complainant showed no resistance. The complainant did not sustain injuries during the commission of the rape and ... the appellant penetrated the complainant's vagina with his finger.⁵⁴

The court does make the connection between the psychological abuse over the years with the complainant's eventual compliance. Had argument been led that the compliance was a product of the cycle of abuse, the judge may have viewed the evidence of grooming differently. Instead, the judge makes the general comment that

sexual assault on children is devastating and leaves an indelible mark in the psychological upbringing of a child; it is even more so when such offences are committed within the household by a father who is naturally entrusted with the protection of his children.⁵⁵

Here, although there was evidence of grooming, it did not feature in Justice of Appeal Magardie's discussion of the crime (which was limited to the submissions made by counsel for the offender). Recognition of the pattern of abuse suffered by the complainant would have made the outcome more palatable, but the decision is instead focused on the offender. Magardie's decision to sentence the perpetrator to correctional supervision is explained as follows:

The sentencing courts cannot apply the one-size fits all approach when sentencing offenders. Ordinarily, a distinction should be made between those offenders who ought to be removed from society and those who, although deserving of punishment, should not. With appropriate conditions, correctional supervision is undoubtedly an appropriate and severe punishment, even for persons convicted for serious offences.⁵⁶

Magardie decides to replace the regional court's sentence of eight years' imprisonment with one of correctional supervision.

Justice Le Grange and Justice of Appeal Weinkove adopted a different approach in *S v AR*, which concerned an accused who created

child pornography with his stepdaughter, and with other children known to him. None of the charges involved violent acts, although the circumstances in which the photos were taken resulted in conviction for sexual assault. The offender was given an eight-year sentence (wholly suspended) by the regional court. The state appealed this sentence as too lenient. The judges in this matter held that

a non-custodial sentence would, in our view, unduly focus on the rehabilitation of the respondent and would lessen the retribution and prevention elements of sentence, to the extent that it would bring the administration of justice into disrepute.⁵⁷

The judges reached this conclusion through a more detailed canvassing of the offences in question. In discussing the images taken of his stepdaughter, the judges address her apparent compliance:

The filming and taking of nude pictures of LC happened over a period of years and multiple videos were made. In our view it is incongruous to suggest that LC was a 'willing participant' [suggested by the magistrate] in the true sense of the words.⁵⁸

This decision shows an understanding of the process under which the eventual compliance was obtained. The judges go on to say:

Common sense dictates that the respondent must have over a period of time created a false sense of security and trust with LC. The respondent's behaviour in this regard can hardly be described as less serious. In fact the opposite is more accurate. It was this false sense of trust, if not grooming, which allowed LC to participate and not speak out.⁵⁹

By highlighting the process under which the offender was able to secure compliance, the

judges succeed in increasing the focus on the nature of the crime within the triad, rather than the disproportionate focus on the offender of the initial judgment. This shift in focus results in the judges imposing an eight-year sentence of direct imprisonment.

These two cases illustrate how the inclusion of a consideration of grooming when sentencing an offender may change the sentence quite dramatically. Both cases involved grooming over a number of years, with the result that the complainants were compliant to the whims of the offender at the time of discovery. Both men were stepfathers, who were responsible for the complainants and trusted to provide safety and care. This position gave them a special kind of power and influence over the developing adolescents. Both men were respectable members of society, gainfully employed and breadwinners for their families. Both men showed remorse, and willingness to be reformed. This became the core feature in the *Enslin* judgment but not in *AR*, where the nature of the offence (which included the grooming process) was foregrounded in the decision. This disparity suggests that evidence of grooming can impact the severity of sentence, depending on the way it is used to negate the existence of consent. The approach taken by the court in *AR* is preferable, as it balances the factors in the *Zinn* triad effectively while affording the victims of sexual abuse through grooming the understanding they deserve.

Conclusion

Sexual grooming is a complex psychological process by which a child becomes compliant to the sexual advances of an older, often trusted person. This process may result in psychological trauma before sexual abuse occurs. This article has considered how evidence of sexual grooming plays a role in the sentencing of offenders who have been convicted of rape or sexual assault of a child. Each child's experience

of being groomed is different, and it is critically important to scrutinise how the courts have used the facts of being groomed, and how they have sentenced offenders who have made use of this manipulation.

Overall, the case law discussed above has shown that there is no clear-cut outcome when evidence of sexual grooming is led in sentencing proceedings. Taking into account the factors in the *Zinn* triad, a judicial officer may focus on features of the process in a way that results in aggravation or mitigation of sentence. The absence of violence that characterises a violation does not produce a consistent outcome, as shown by the difference in decisions in *Muller* and *AS*. The SCA decision of *MG* prevents sentencing courts taking the compliant behaviour of children under 12 into account in mitigation of sentence in the future, but it does not guarantee the same for children over 12. Finally, the contradiction in outcome between *Enslin* and *AR* reveals how a focus on evidence of grooming, when considering the nature of the crime, might impact outcomes. If the psychological process of grooming the child is not taken into account, more weight may be placed on the offender's characteristics, as it did in *Enslin*. *AR*, on the other hand, shows that the nature of the offence must be properly balanced against the offender's considerations in order to achieve an appropriate and sensitive sentence. This latter approach is preferable in sexual offence cases that are facilitated through grooming. The absence of violence in a rape or sexual assault matter should not constitute a factor that allows for mitigation of sentence. Apparent consent after psychological manipulation should also not allow for leniency. While sentencing is a process that depends intimately on the facts of the case before the court, evidence of grooming should be something that produces similar outcomes in punishment.

Acknowledgements

My deepest thanks to Bronwyn Pithey for lending her experience and guidance on the various drafts of this article.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

Notes

- 1 Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 (Act 32 of 2007) (SORMA), section 3.
- 2 Ibid., section 5.
- 3 N van Zyl, Sexual grooming of young girls: promise and limits of the law, *Agenda*, 31:2, 2017, 44.
- 4 S Ost, Getting to grips with sexual grooming? The new offence under the Sexual Offences Act 2003, *Social and Legal Studies*, 26, 2004, 147–159.
- 5 A McAlinden, 'Setting 'em up': personal, familial and institutional grooming in the sexual abuse of children, *Social and Legal Studies*, 15, 2006, note 3.
- 6 A Salter, *Transforming trauma: a guide to understanding and treating adult survivors of child sexual abuse*, Newbury Park: Sage Publications, 1995, 74.
- 7 McAlinden, 'Setting 'em up', 347.
- 8 *S v Marx* (2005) 4 All SA 267 (SCA).
- 9 *S v Muller* (2007) JOL 19407 (W).
- 10 Section 18 of SORMA lists types of conduct that are criminalised as the crime of either sexual grooming or promoting sexual grooming.
- 11 SORMA, section 19(2)(a)(ii).
- 12 Ibid., section 18(2)(c).
- 13 *S v Muller*, 35.
- 14 *S v Zinn* 1969 (2) SA 537 (A), P540G.
- 15 SORMA, section 51(3)(a).
- 16 This section was inserted by the Criminal Law (Sentencing) Amendment Act of 2007 (Act 38 of 2007).
- 17 *S v Malgas* 2001 (2) SA 1222 (SCA).
- 18 S Terblanche, Mandatory and minimum sentences: considering s 51 of the Criminal Law Amendment Act 1997, *Acta Juridica*, 2003:1, January 2003, 213.
- 19 *S v Malgas*, 22.
- 20 KS Baehr, Mandatory minimums making minimal difference: ten years of sentencing sex offenders in South Africa, *Yale Journal of Law and Feminism*, 20:1, 2008, 227.
- 21 *S v Steyn* 2014 JDR 2271 (GJ).
- 22 Ibid., 12.
- 23 Ibid., 68, quoting *S v Mokela* 2012 (1) SACR 431 (SCA).
- 24 Ibid., 80.
- 25 SORMA, section 51(1) requires the imposition of a life sentence based on factors contained in part I of schedule 2. Schedule 2 includes rape in circumstances where the victim was raped more than once. It also includes rape when the victim is under the age of 16.
- 26 Although this case was decided before the inclusion of section 51(3)(aA), which prohibits the court from considering lack of violence as a factor, it uses a similar approach.
- 27 *S v Muller*, 9, 84.
- 28 *S v AS* 2012 JDR 2554 (FB).
- 29 Ibid., 36.
- 30 Ibid., 36.
- 31 SORMA, section 57(1): 'Notwithstanding anything to the contrary in any law contained, a male or female child under the age of 12 years is incapable of consenting to a sexual act.'
- 32 *MJM v S* (2014) JO 32265 (GP).
- 33 Ibid., 15.
- 34 Ibid., 25.
- 35 Ibid., 20.
- 36 Ibid., 20.
- 37 *Director Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA).
- 38 Judge of Appeal (JA) Willis held that the court did not have the necessary jurisdiction to hear an appeal, as section 1 of the Superior Courts Act excludes jurisdiction on any matter regulated by the Criminal Procedure Act 51 of 1977 (CPA). The court then finds the matter to be excluded based on section 316B of the Criminal Procedure Act, which, based on the interpretation in *Director of Public Prosecutions v Olivier* 2006(1) SACR 380 (SCA), only allows appeals against sentence by a High Court acting as the court *a quo*. Here the High Court had acted as a court of appeal. Because of the provision in section 316B of the CPA and section 1 of the Superior Courts Act, Willis held that the court did not have the jurisdiction to hear the appeal.
- 39 *Director Public Prosecutions, Gauteng v Mphaphama*, 12.
- 40 *S v MG* 2015 JDR 0131 (GP).
- 41 Other allegations of vaginal and anal penetration were not proved beyond a reasonable doubt because the complainant described the accused as having touched her there, but not having put his penis inside of her.
- 42 *S v MG*, 15.
- 43 In her evidence the complainant stated that she participated in these activities with the appellant because he told her there would be trouble if she did not do as he told her.
- 44 *Director of Public Prosecutions, Gauteng v MG* 2017 (2) SACR 132 (SCA).
- 45 On appeal the SCA held that the court did have the power to overturn the sentence imposed by the High Court based on circumstances near identical to those in *Mphaphama*. JA Petse decided that the question raised by the Director of Public Prosecutions (DPP) was to be decided under section 311 of the CPA, which allows the DPP to appeal a decision in favour of the accused if it is regarding a question of law. Petse distinguished the current matter from that in *Mphaphama*. This was grounded in the finding that a judicial discretion exercised based on an incorrect legal basis was a question of law, which drew the matter within the ambit of section 311 of the CPA. See *Director of Public Prosecutions, Gauteng v MG*, 35.
- 46 *Director of Public Prosecutions, Gauteng v MG*, 28.
- 47 Ibid., 35.

48 *Grobler v S* 2017 JHC 383 (GP)

49 *Ibid.*, 40.

50 *Ibid.*, 46.

51 *Ibid.*, 40. Fischer paints a detailed picture that highlights many elements of grooming in his consideration of the nature of the crime. 'In this case, what should have been the home and sanctuary for the child was turned into a place where she found herself subject to the worst threats imaginable, and this from a man who purported to be her guardian and protector. She was subjected, not only to fear and mental anguish over a protracted period of time, but also to degradation and humiliation of a type which struck at the very core of her developing self. Whilst she should have been nurtured and guided at this crucial stage of her young life, she was predated upon by the appellant who was opportunistic, in taking advantage of the absences of her mother from the home. She was deprived of the comfort and protection of her mother and other adults by being intimidated by the appellant into keeping his confidences. This is not the type of sexual abuse which allows escape for the victim from the perpetrator. It is domestic in nature. The victim must reside with him at close quarters and feel his constant gaze upon her and his presence around her. She must enter into the pretence of normality in the face of extreme aberration. It is apparent that the sexual abuse of the child in this case was not isolated nor was there an end in sight for her. Had the appellant not been caught, the indications are that he would have continued his abuse of her. The pornographic material made by him and his preserving thereof can only be seen in a context of his wishing to extend and enhance, for his purposes, whatever personal gratification he derived from his violations of the child. He has shown no remorse or regret and neither has he made any move to take any responsibility for his crimes. His conduct shows a large measure of planning and deviousness.'

52 *Enslin v State* 2016 PHC 1090 (GP).

53 *S v AR* 2017 (2) SACR 402 (WCC).

54 *S v Enslin*, 9.

55 *Ibid.*, 12.

56 *Ibid.*, 18.

57 *S v AR*, 49.

58 *Ibid.*, 38.

59 *Ibid.*, 38.

Book review

Anneliese Burgess

Elrena van der Spuy*

elrena.vanderspuy@uct.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a5615>

Anneliese Burgess, *Heist! South Africa's cash-in-transit epidemic uncovered*, Penguin Random House, 2018, ISBN 9781776091713.

More than 50 years ago, Howard Becker asked the question Whose side are we on? in our conversations about crime and criminals.¹ Becker intended the question to force us to reconsider our assumptions about the value-free nature of research, the neutrality of the 'law', and the pathology of the criminal 'other'. Becker's argument was that, in our studies of the social world, we cannot avoid taking sides.

Becker's question has long plagued South African criminology. How else, in a political context where law and enforcement agencies served minority interests and where processes of criminalisation for contravening a plethora of apartheid laws so cruelly impacted on the racial underclass? Twenty-five years into the new democracy, Becker's question is still with us. The connection between crime and politics has not been disrupted. Social inequality continues to feed social discontent and moral ambivalence about the law and its enforcers. Furthermore, over the past two decades criminal enterprises and illicit networks have flourished. The destinies of the licit and illicit have become intertwined, and the question Whose side are we on? remains without a definitive answer.

In May 2018 Anneliese Burgess's *Heist! South Africa's cash-in-transit epidemic uncovered* was published. The publication was well timed. A few weeks after it appeared there were concerted efforts to mobilise security personnel, law enforcement agencies, the banking industry and the public around the 'plague' or 'pandemic' of heists. In mid-June 2018 security personnel and their trade unions staged protests in major cities across the country. Key arteries in Gauteng were throttled as cash-in-transit vehicles drove in slow formation. Protest

meetings by security personnel and their trade unions demanded immediate and lethal action against the perpetrators. 'Shoot to kill the thugs' – the title of one poster – summarised the mood. The trade union federation COSATU put forward a number of proposals: improve the conditions of employment for security personnel and upscale their training; utilise new technologies (more heavily armoured vehicles and better weapons) to reduce risk; deploy police escorts for transit vehicles; and root out corrupt elements inside security agencies.

The go-slow protest actions took place a day before the Parliamentary Portfolio Committee convened a debate on the issue (13 June 2018).

* Elrena van der Spuy is a member of the Centre of Criminology, University of Cape Town.

During the debate Police Minister Bheki Cele stated that cash-in-transit heists constituted a form of terrorism. They were meant to spread fear. In response, a high visibility and intelligence-driven campaign – a kind of counter-terrorist strategy – was necessary. He further acknowledged that insider rot in intelligence and police circles formed part of the problem. Any containment strategy also had to tackle ‘feeder crimes’ that stemmed from vehicle hijacking and the trade in illegal firearms. He reassured those present that under his watch he had every intention that the South African Police Service (SAPS), in close collaboration with the private security and banking industries, would ‘turn things around’.

Against this background, *Heist!* brings a disciplined inquiry to a complex issue of organised criminality. Burgess explores the phenomenon through 10 case studies presented over 35 chapters. Viewed together, the 10 case studies reveal key issues of importance for those interested in the study of crime and the discipline of criminology.

Data gathering: In the first instance *Heist!* sets an enviable example of robust data gathering. Documentary research is combined with rich interview data. Burgess possesses key critical skills from her years of investigative journalism. She is adept at following leads, cultivating connections, speaking to a wide range of informers and respondents, and double-checking sources. We read how plans about heists are conceptualised and put in motion. There are details about the heated and fleshy moments of ambush and contact. There is the efficient extraction of loot, of beating fast escapes and the miraculous disappearance into thin air of both perpetrators and their takings.

Key actors and groupings: Burgess provides a detailed breakdown of the human actors involved in heists. Cash-in-transit heists are not infractions committed by lone actors. Organised

forms of crime require groups of individuals to band together in pursuit of a common criminal goal. Such groupings are invariably stratified. There is role specialisation, with divisions of labour between individual cogs in the looting machine. The actors involved belong to social hierarchies and form social networks. They have social histories and career trajectories. While they are all men, they differ in role and personal history. There are the kingpins who write the crime script and give the orders. Foot soldiers play subsidiary roles. There are accomplices (or ‘Fingers’), recruited from the criminal justice system and the private security sector. In *Heist!* we confront a medley of actors – the drivers of cash-in-transit vehicles, the perpetrators and their accomplices.

Modus operandi: The technical or performative elements of law-breaking behaviour have been a respectable focus of criminological enquiry. Cash-in-transit heists are not crimes of passion committed in the heat of the moment, but require cool heads, professional skills and hard tools (men, vehicles, guns, explosives). Precision and nerve are necessary traits in this business. Burgess captures the modus operandi, the degree of planning and the level of organisation leading up to the event, and the mechanics at the moment of execution of a heist. For students of criminology, this engagement with the technical operationalisation of the crime sets a fine example of what it takes to map crime offence dynamics.

Motivational incentives: The motivational factors which propel people towards deviant or criminal activity have been central to criminological debates. Textbooks routinely invoke a wide range of risk factors organised into micro, meso or macro levels in search of explanations of criminal involvement. Not a professional criminologist, Burgess still succeeds in capturing critical moments in the lives of heist operatives. Here and there we

confront the critical motivations which spurn, push or pull them into the vortex. We also learn a fair bit about the rationalisations they invoke to justify their actions.

The seduction of crime: In 1988 Jack Katz lambasted criminologists for their lack of attention to the 'seductions of crime' or what he described as 'the moral and sensual attractions in doing evil'.² When crime is interpreted in social pathological terms, there is little space to recognise the thrill of law-breaking behaviour. Burgess succeeds in confronting the allure of the heist as action-on-steroids. Her respondents talk about the addiction to the thrill, of the build-up of tension before the hit, the rush experienced in the execution of that hit and the satisfaction-after-action. This kind of crime executed on highways constitutes public theatre. As public spectacle, it comprises bravery and violence, and yields bags of loot. The emotions invoked in spectator circles are contradictory. Horror and intrigue intermingle. The perpetrators project images of modern Robin Hoods pitted against the corporate giants. In their rationalisations of their actions they talk about a redistribution of wealth and of the insurance industry offsetting the losses of the industry. In effect, the author poses the question: *Whose side are we on in this instance of cash-in-transit heists?* Here the book moves beyond self-serving rationalisations and structural imperatives to consider the costs associated with cash-in transit heists, both for the economy and for society.

The trouble with organised crime: *Heist!* illuminates too the connections between the illicit and licit – between gun-wielding perpetrators, criminal networks and corrupt elements within the police and prosecutorial services. The complicity of state officials across the security and justice sector is described in compelling detail. She captures too the slow grinding of the wheels of justice; the tricks

utilised by defence lawyers in drawn-out court proceedings and the routine intimidation of witnesses. Such systemic features, combined with the tampering of records and the disappearance of evidence through corrupt court officials, result in institutional paralysis.

Heist! makes for riveting and troubling reading. It also poses a challenge to us all as we search for an appropriate balance between rich description of the complexity of crime dynamics; sound explanations that recognise both structure and agency; and policy-orientated interventions that can begin to contain the costs associated with organised forms of criminality. The spirit of enquiry she exhibits follows the advice of Howard Becker in the concluding paragraph of his essay:

We take sides as our personal and political commitments dictate, use our theoretical and technical resources to avoid the distortions that might introduce into our work, limit our conclusions carefully, recognize the hierarchy of credibility for what it is, and field as best we can the accusations and doubts that will surely be our fate.³



To comment on this article visit

<http://www.issafrica.org/sacq.php>

Notes

- 1 H Becker, *Whose side are we on?*, *Social Problems*, 14:3, 1967, 239–247.
- 2 J Katz, *The seduction of crime: moral and sensual attractions in doing evil*, New York: Basic Books, 1988.
- 3 Becker, *Whose side are we on?*, 247.

On the record

Nicolette Naylor and Sibongile Ndashe discuss local and global developments on sexual harassment and the role of the law in responding

<http://dx.doi.org/10.17159/2413-3108/2018/v0n65a5574>

Recent local and global developments have turned the spotlight on the role of law in addressing sexual harassment in the workplace. Almost four decades after feminist legal scholars pushed for laws which recognise that sexual harassment constitutes a form of discrimination that is legally actionable, it is important to take stock of the success and limits of the law. In recent times the law has increasingly been accused of complicity in shielding abusers by (mis) applying sexual harassment policies to exonerate the perpetrators, or failing to hold institutions to account over claims that their hands are tied because victims do not want to lay formal complaints. Nicolette Naylor (Director, Ford Foundation for Southern Africa) and Sibongile Ndashe (Executive Director: The Initiative for Strategic Litigation in Africa [ISLA]) discuss the role of the law against the backdrop of the successes of campaigns like the #MeToo movement, which encourage survivors to speak out by unmasking and publicly naming perpetrators. The conversation was originally presented as an ISLA Conversation between Nicolette and Sibongile on 10 July 2018 in Johannesburg.

Sibongile Ndashe (SN): Nicolette, sexual harassment has been in the news a lot recently in South Africa, on the rest of the continent and globally. It is not a new phenomenon, but definitely something has changed, which raises questions about whether the law can be used as a tool to fight the scourge of sexual harassment, or whether the law may well be something that has enabled sexual harassment.

Forty years ago, when sexual harassment was defined as discrimination in the US, especially sexual harassment in the workplace, we thought that was a big step. In South Africa, we were fortunate. Twenty-two years ago, we had a new Constitution and an industrious Parliament. We had courts that had defined themselves as

transformative courts and we had new pieces of legislation. But it does look like it was a sprint and we really didn't get to internalise what was in the law and that's how we find ourselves here. So, what were the big things that came with the advent of the Constitution?

Nicolette Naylor (NN): I think, like you rightly point out, Sibongile, in a way we leapfrogged a lot of what's happened in the rest of the world. When sexual harassment was first coined as a term in the US in 1979 by Katherine McKinnon, they went through a process where they went through many cases to try to establish this as a form of discrimination. They were debating this notion of sexual harassment as sex discrimination under civil rights at the

time – asking *is* sexual harassment a form of sex discrimination? A lot of case law in the US debated this, bringing different cases and different fact patterns that the courts and supreme court had to grapple with.

In South Africa, I think, it was great that we could build off that normative framework and when our Employment Equity Act (EEA) was passed it defined sexual harassment as discrimination. As a result, we didn't need the supreme court to pronounce on it. So, while in the US they used the Civil Rights Act to define sexual harassment as discrimination, for us our EEA was there to try to address the imbalances of the past – to deal with the legacy of apartheid, racial discrimination and sex discrimination, gender discrimination. So, here we faced a similar kind of historical trajectory, and we could start from the premise that this is discrimination. And that has benefited us. What I think has been the problem is whether people around us saw it that way – in other words, whether they understood sexual harassment to be defined as discrimination. We really needed further guidelines around what this meant in practice. How do employers really grapple with this notion of sexual harassment? And that's where we started to define what's called the Code of Good Practice on the Handling of Sexual Harassment¹ to try to give people more guidance.

I don't want us to think that sexual harassment didn't happen in South Africa before the EEA. Women have been harassed and economically disempowered in the workplace for centuries. We just didn't have a name for it, and a legal right and a claim against it.

SN: What happened in South Africa before the EEA? In other countries there may not be an EEA, but people use anti-discrimination laws to deal with sexual harassment. What was the process like in South Africa before the law was passed?

NN: There is a common law duty for employers to keep the workplace safe. We all know, for example, about occupational injuries and workplace safety. But you also have a right not to be abused in the workplace, and you have a right not to be assaulted in the workplace. So, irrespective of the Constitution and the EEA, we have that common law duty to be safe and to be protected. Cases were brought using this framework. South Africa's first case happened in 1989, when someone was dismissed for sexual harassment and the court actually dealt with this under the common law duty of safety in the workplace. With these types of cases you were entitled to claim for damages under the *actio injuria*, in other words, you could claim damages for pain and suffering and the impairment of your privacy and safety.

You could open a criminal case as well for assault, for example, depending on what happened. But very few such cases were being brought at that time and I think this is something we can talk about as feminist lawyers. Many of the cases brought were men who had been dismissed, and who were challenging the grounds for their dismissal. Employers were saying that the reason for these dismissals was that the men in question were treating people badly and harassing women in the workplace. But these cases were not grounded in a notion of equality, nor were they grounded in a power analysis or an analysis of discrimination. Our Constitution gave us that moment, that moment for us to start grounding it in a notion of discrimination. So, you always had a claim, but that 1998 EEA then gave us the right to use the discrimination framework and the impairment of dignity framework.

SN: So why is it important to have it framed as discrimination? Many people may argue that if you can go to court and get what you need, if you can sue, why is the framing so important? Courts also struggle to understand this. We are

seeing cases even from the African Commission coming out saying 'of course something wrong happened to her, but we cannot find the discrimination'. What are the struggles and tensions? The court may have found for you, it may have acknowledged that what happened to you is wrong. But they stop short of saying that this is something that happened to you because you are a woman.

NN: This is exactly what was happening in the US. With a lot of the case law that was being brought around sexual harassment, the courts were grappling with the notion that the harassment happened only because the survivor was a woman. And the problem with this was that it allowed employers to say 'it was only this woman', and the perpetrator would say 'it's not other women ... it's only this woman', which made it difficult to recognise that harassment was targeted at women in general. The US courts grappled with this a lot, arguing that the harassment must be the result of a woman's gender as well as something else ... that this went beyond victimisation on the basis of sex.

In South Africa, we have started from the premise that the problem must be grounded in an inequality analysis. And I think grounding it in a power and inequality analysis is important. With our discrimination framework, you don't have to prove discrimination – we can use the EEA and the Constitution, which recognise that sexual harassment falls within the realm of discrimination. We are saying that this victimisation happens not just on the basis of sex, but on the basis of sex, gender, sexual orientation, class, race and other grounds. We have had to acknowledge that in reality the way that this plays out in the workplace in the South African context is that it is intersectional. And I think it is powerful for us to use that kind of framework.

SN: Let's look at the challenges too. Look at the cases that have come from the labour court and the labour appeals court in the last three years – the *Naspers* case,² *Campbell Scientific Africa v Simmers*,³ *Labe v Legal Aid*,⁴ the *Rustenburg Mines* case.⁵ What is becoming very clear is that, even though we are saying that these cases should be based on a power analysis, legal access actually defines who has got the power and who can exercise the power. The cases that have come through the labour court involve middle-class, white women, in other words, people who are able to go to court and exercise their rights. Much of what we've seen is about sexual harassment in the workplace ... office based, where people have gone away on a business trip and someone has demanded sex in that way.

So, while we say that there is a law that protects everyone, in fact, the law has really not been tested on cases where women are not as empowered. Cases, for example, involving domestic workers or farm workers. There is a group of women that is marginalised, not in the law itself but because they don't have access to the law. The jurisprudence that we have developed has really not been able to surface those challenges. How then do we ensure that when we talk about sexual harassment now, when we look at the law books, that we are not actually talking about the sexual harassment of middle-class women, but that we are talking about sexual harassment in all spheres of life?

NN: I think this is the critical point. It is almost the next frontier that we have to grapple with. When I was involved in drafting the amended Code of Good Practice for the Handling of Sexual Harassment, there was this fear that we were going to open the floodgates to these kinds of cases. But I haven't been able to find this plethora of cases. In fact, we haven't been very litigious and, as we mentioned earlier, many of the cases have been brought by

men challenging their unfair dismissal. What's interesting for me is that the one case we have that involves a black woman in Khayelitsha, a security guard minimum wage worker, was brought by the Women's Legal Centre, a public interest law centre acting on her behalf.⁶ Bringing these cases is expensive: it is financially costly, and it is emotionally costly for women to bring these cases in a context of high unemployment where people just want to keep their jobs. That is something we didn't grapple with. We were so focused on getting the discrimination framework right, getting the Code of Good Practice to lay out the definitions and the formal and informal procedures. But the access question, and how people were actually going to engage with the framework, is something that we missed, and that's our next challenge. The cases brought by middle-class women, wealthy women and women in businesses taking on big companies have developed our jurisprudence. It has developed a framework for us to hold people accountable, and that is not insignificant. But I do think that the biggest problem for us is that the majority of women are not using the system because of their lack of access, and because of the victimisation that people feel going through the system. It is hard going through the system. Are women being believed? I think who gets believed – whether it's in a legal process or in a process within the workplace – is also associated with power and privilege. White women are believed much easier than black women. Hollywood actresses are believed more so than domestic workers.

I've been out of practice for many years, but when I was involved in the *Ntsabo* case I was looking for a case on behalf of farm workers or domestic workers, and I couldn't find one. And I think we really need to bring those types of cases because we could go back to the analysis around the economic power that is involved in sexual harassment. We focus a lot

on the sexualised notion of harassment and we forget the economic and class dimensions of the problem. Some case law on those aspects would be wonderful to see.

SN: Now let us talk about the law itself. Over the past few months we have heard stories, particularly in the public interest or social justice sector in South Africa, that the law has been used, but not to protect women. We have heard about legal and disciplinary processes that have not been used progressively, where disciplinary panels have been improperly constituted, or where the quality of the investigation was questionable. The critique that this raises, is that the law is just a tool like any other – it depends on how you use it. You can use it to build and you can use it to destroy. When it comes to the duties of the employer, one of the problems that we have seen is that these are treated as tick box exercises. They use the code, they have policies that they have passed. But all of these things are just procedures: you cannot actually guarantee that they are going to lead to an effective investigation or that substantively they are going to be fair to the people who are going to use them.

Employers will say that their hands are tied because the complainant doesn't want to proceed with the case, so what can they do? As if there are no positive obligations on an employer to protect their employees. How did it come about that employers feel so powerless to do anything about the workplace when they actually have to take care of the health and safety of their employees, and have to ensure that they are free from bullying and harassment of any kind?

NN: The EEA clearly says there is a duty, a positive duty on employers, to ensure there is no discrimination on the basis of race and gender in the workplace. An employer's hands can therefore never be tied. There has been recent case law⁷ in the labour appeals court

where Liberty Life argued exactly that, that their hands were tied because the complainant didn't want them to act against the perpetrator. The appeals court confirmed that the EEA places a positive duty on the employer to eliminate discrimination, and to make sure that their workplace is safe and free from sexual harassment. So, while you have to respect the complainant's right not to go through a process, to respect their autonomy and not force them to do what they don't want to do, that doesn't mean that employers can sit back and allow a culture of sexual harassment to flourish.

The point about culture is one that I want to emphasise. Procedures will never fix toxic cultures. We can come up with hundreds of procedures (which is the bandwagon that everyone appears to be on in terms of sexual harassment) but you actually need to fix the culture within an organisation to deal with the problem. The *Ntsabo* case showed that if employers fail to act they can be held liable, just as if they were the harasser. In law there is this notion that, if you act in the course and scope of your employment, your employer can be held liable. So, before, employers would always say that the employee was acting on their own volition, and that their contract does not allow them to sexually harass people. But our EEA says that employers have a duty to act against racist or sexist behaviour. The employer can't say that the employee is off on a frolic of their own. There is a duty on employers to eliminate discrimination. That's the piece that we need to utilise more when people say things like 'our hands are tied'. Your hands can never be tied in a context of racism or sexism in your workplace.

SN: Linked to this issue is how employers also want to confuse themselves around the issue of confidentiality ... that they really can't do much because it is also confidential. How is confidentiality actually set out in the legislation? What must remain confidential and

when is confidentiality required? This requires clarification over and over again because it is another shield that employers use to avoid dealing with problems of sexual harassment.

NN: This kind of shielding silences us a lot. The Code of Good Practice on Sexual Harassment lays out that confidentiality is only applicable in two very specific circumstances. The first circumstance it addresses is during the investigation, when you have to protect the identity of the complainant and the perpetrator. Their identities must be kept confidential, but that protection does not extend to the details of the incident itself. In other words, if you say that there is a case between two employees, Mr X and Miss Y, and this is what happened, you're not contravening the code. The second circumstance relates to the process during the inquiry, when management must make sure that only the people that are required to be in the inquiry – the witnesses, the employer and the employees – are present. That's what the code says. But it doesn't prohibit the employer from releasing the finding, despite what employers often say.

There is a nice provision in the code which I think feminist lawyers should take hold of: the third part of the code says that there is a duty on the employer to provide all reasonable information that complainants may need as they are preparing for their case. In other words, you are entitled to get any information that you may need to prepare for your case. This is where you, as the complainant, could say: 'I would like to know whether this company has had other cases of sexual harassment.' You could use that in a discovery process to show a hostile environment, to show this has happened in the past, maybe not with this perpetrator, but with others. I would like to see us use that provision.

There is another problem that we have, but which is not addressed in the Code of Good Practice, about non-disclosure agreements. But

this issue is also different to what the code says about confidentiality.

SN: Let's move on to the non-disclosure agreements. When did settlement agreements become synonymous with non-disclosure agreements? We see that perpetrators, whether they are let off the hook or dishonourably discharged, will use confidentiality agreements to avoid talking about what happened. This means that you can be a serial harasser who is fired from a company and can go next door and continue to do it. And not even the victims or survivors of the harassment can talk about it because there are non-disclosure agreements in place. Of course, there is a global trend against non-disclosure agreements, based on the view that these agreements do more harm than good. But there are reasons in labour law as to why employees want these agreements to form part of the settlement. They ensure that there is a clean break. It makes sense for lawyers and employers to say we leave the facts as they are: you are not conceding to anything and you will get your severance pay and you will leave, and in return we are not going to disclose what happened. The knock-on consequence of non-disclosure agreements, however, is that they have worked as silencers. If a survivor discloses, she may be asked to repay the settlement that was paid to her. Even if survivors hear other people talking about experiences similar to their own, they cannot speak to them about it, or even admit that the same thing happened to them. What is the movement now globally, and what can we learn about what's happening with non-disclosure agreements?

NN: I think that this is something we should really apply our minds to. We should call them secrecy agreements because they really are secrecy agreements. Non-disclosure agreements came about to protect things like employers' intellectual property and copyright. Unfortunately, both here in South Africa and

around the world, it has become a standard term that we put into agreements. I think we shouldn't confuse the issue, though. I am not against people settling. If a woman decides that she does not want to go through the process and would prefer to take an amount of money and settle, then that's a settlement agreement. There is nothing wrong with that. But that clause that prevents her from speaking about it, that's the problem. I think the notion that you could ever have any form of non-disclosure agreement when you are dealing with discrimination should be unacceptable and should be regarded as harmful. Because what is the object and the purpose of a non-disclosure agreement? It is to protect information or secrets like intellectual property, and not to protect someone who has discriminated against people or harmed other people. We need to be turning this practice into a dirty word in the context of sexual harassment and racial discrimination.

Here I think we can thank the #MeToo movement, because it put the spotlight on this issue in the case of Harvey Weinstein. Women were coming to speak out even though when they spoke out they were breaching non-disclosure agreements and risked having to pay back the money. Now there is a movement in some states in the US to have these clauses banned. These clauses have prevented prospective employers from finding out about perpetrators' histories and have prevented women from forming solidarity with other survivors. It is very hard for women to break a non-disclosure agreement when they run the risk of having to pay back money.

So, I would say that what we could be thinking of in our context is having a campaign to put the onus on companies to say no to these agreements rather than putting the onus on women to break the agreements. Let's just say this is unacceptable. Or let us get a group of women to break their non-disclosure

agreements and we take their cases on because it is in the public interest to know perpetrators are causing harm. This is violence against women in the workplace and it is in the public interest to know that this is happening.

SN: There have also been instances where there are no agreements in place, and people are coming out on social media and naming people as perpetrators of sexual harassment in various industries. The risk that these survivors run is defamation – the threat or the fear of defamation suits is actually what stops people from speaking out. So, this silencing is not only limited to instances where there are non-disclosure agreements in place. There is a trend or movement towards fighting against these kinds of defamation suits. In other countries there are funds that have been established to pay for cases where people are sued for speaking out. Unfortunately, in this country we don't have these kinds of funds. But under defamation law there is a defence that is used, which is this is the truth and also in the public interest. I think that sexual harassment is an issue of public interest, and naming perpetrators acts against harmful behaviour. But once again it goes to legal empowerment – whether you are able to understand that sexual harassment is a public interest issue and that you may have a defence in the public interest. We need to develop jurisprudence along these lines.

NN: I think we can learn a lot from what communities are doing in taking on mining companies in the context of extractive industries, where the communities are being hit with SLAPP³ suits, which aim to tie up communities in court processes and demobilise a movement. We need to find ways to support people so that they aren't being derailed by being tied up by massive companies bringing these kinds of suits. Because you can shut down an organisation, you can demobilise a whole movement like this. So, one avenue

is defending these kinds of actions in the courts and getting good judgments. We need public interest lawyers to take on this kind of thing and I think we should start thinking about whistleblowing. We have protected disclosures in South African law under the EEA or under PEPUDA (the Promotion of Equality and Prevention of Unfair Discrimination Act), which allows people to speak out in cases of unfair discrimination without the fear of reprisal. A more common example would be whistleblowing about corruption. The Act can be used for discrimination matters and where the safety of people is affected, but in this respect the first cases were brought by white men challenging affirmative action. We have also had men use the protected disclosures laws to try to prevent sexual harassment hearings. I think we need to start using these provisions where women collectively, in solidarity with each other, make disclosures. We should be arguing that these are protected disclosures, and that these women should not get sued because their disclosure was in the interest of enforcing the duty of employers to make sure that the workplace is safe.

SN: As we talk about these kinds of strategies, one gets the idea that the law can be helpful. But, as we have pointed out, we have a problem with legal empowerment. For people to use all of these strategies that we are suggesting, they have to be legally empowered. The next hurdle, when you know what the law says, is about how to access the law. One of the things that has been encouraging about the issue of sexual harassment is seeing legal tools merging with popular campaigns to be able to really push the frontier. Because we recognise that these are not battles that are going to be won in court only because of the limitations of the law. But what do the #MeToo and #TimesUp movements, which seem to have worked globally, look like in a context like ours? Is such a movement possible for us?

NN: I think there is enormous possibility when you merge the popular solidarity movements that are going out there and naming and shaming, but are similarly recognising the limitations of the law. We should use the law when it is appropriate. But we should also recognise that law is a blunt instrument. It can victimise, it can silence, and it can also empower. Feminists need to reshape the law and be creative about that. We also need people who say: ‘we are not going to put all our hope in the law’ – we are actually going to go out there and do things like #MeToo and #TimesUp.

Despite all the criticism about those movements, they have leapfrogged ahead, while we have waited for a court case, or waited five years or 10 years for the appeal court to do something. The #MeToo movement has got people to talk about non-disclosure agreements and got people to come up with bills to do away with them. I think that’s a model of what we can do in this country, and I think I’m seeing that already. What’s been so courageous about the women coming out and speaking up about what’s happening in the social justice sector is evidenced in the kind of support feminists have given women in that space. It shows that there is power in solidarity; firstly for women to be believed, for that belief to be acted upon and then for the change to happen. You don’t only have to see change happening through the law and through a legal process.

There is a wonderful judgment from a few months ago in 2018 where a judge in the labour court brought #MeToo into the courtroom. I loved the fact that #MeToo has been quite dismissive of the legal process and has said we are going to name and shame. And now we have a progressive judge who has written about how patriarchal and misogynistic the legal process can be, how it can victimise people, how we should be careful about victim blaming

and victim shaming, and how the court needs to take into account the global movement called #MeToo and the scourge against women. I think that is a nice merging of an insider/ outsider approach, where that feminist agitating is coming into our courtrooms. I was recently reading a piece by Katherine McKinnon where she asks how we make sure that #MeToo does what the law can’t do. And I think that in South Africa we have seen the two coming together and that’s thanks to feminist lawyers pushing that boundary. So, let’s do both of those, I think.

Notes

- 1 Department of Labour, *Code of good practice for the handling of sexual harassment*, 2008, <http://www.labour.gov.za/DOL/legislation/codes-of-good-practice/labour-relations/code-of-good-practice-on-handling-sexual-harassment-cases> (accessed 10 September 2018).
- 2 *Media 24 Ltd and Another v Grobler* (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005).
- 3 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015).
- 4 *Labe v Legal Aid South Africa and Others* (JS895/16) [2017] ZALCJHB 248 (20 June 2017).
- 5 *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018).
- 6 *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC).
- 7 *Liberty Group Limited v M* (JA105/2015) [2017] ZALAC 19; (2017) 38 ILJ 1318 (LAC); [2017] 10 BLLR 991 (LAC) (7 March 2017).
- 8 ‘SLAPP suits’ is an acronym for strategic lawsuit against public participation (SLAPP). (See G Pring and P Canan, *SLAPPs: getting sued for speaking out*, Philadelphia: Temple University Press, 1996.) These retaliatory cases are brought with the intention to silence or censor activists and critics by burdening them with a costly defence.

Previous issues

Articles in Issue 64 confront questions about what proper governance and accountability mean in the criminal justice environment, and how research, law and policy reform may engendering change. Gareth Newham and Brian Rappert reflect on the ways that operations-focused research collaborations between police and external bodies can shape policing in practice. Lukas Muntingh looks into police oversight, in particular the powers and performance of the office of the Western Cape Police Ombudsman. Shifting focus to the public's pushback against inadequate governance, Lizette Lancaster presents data from the Institute for Security Studies' Protest and Public Violence Monitor that shows how wide-ranging and geographically dispersed protest grievances are. Fatima Osman looks at the latest version of the Traditional Courts Bill and asks whether it sufficiently addresses the fundamental objections to previous versions. Bill Dixon reviews two books: Andrew Faull's *Police work and identity: a South African ethnography*; and Sindiso Mnisi Weeks's *Access to justice and human security: cultural contradictions in rural South Africa*. In 'On the Record' Guy Lamb and Ncedo Mngqibisa discuss the in-the-field realities doing of doing a randomised household survey in South Africa.



Articles in Issue 63 illustrate or address change, justice, representation and response in criminal justice in South Africa and beyond. Guy Lamb and Ntemi Nihilwa Kilekamajenga ask how systems and agencies learn from periods of crisis and reform. Lamb focuses on the impact of massacres by the police on policing reform, and Kilekamajenga focuses on the options for reform in the overburdened and overcrowded Tanzanian criminal justice and prison systems. Peter Alexander et al. examine the frequency and turmoil of community protests between 2005 and 2017, and challenge us to reconsider the ways in which protest is framed as violent, disruptive and disorderly, and how we measure and represent it in the media and elsewhere. Jameelah Omar provides a case note on the Social Justice Coalition's successful constitutional challenge of provisions of the Regulation of Gatherings Act. In 'On the Record' two scholar/activists, Nick Simpson and Vivienne Mentor-Lalu, discuss the water crisis and its impact on questions of vulnerability, risk and security.

